39411

IN RE ESTATE OF CATHERINE McKEOGH,
Deceased,

ANNA ATKINSON, Claimant below,
Appellee,

v.

MICHAEL J. KILGUIDE, Executor, etc.,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

293 I.A. 621

MR. PRESIDING JUSTICE MORAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendant, Executor of the Estate of Catherine McKeogh, deceased, from the order dismissing his motion in the nature of error coram nobis to vacate the allowance of the claim of Anna Atkinson against the estate for the sum of $743.25, as a claim of the sixth class, to be paid in due course of administration.

The defendant presented a motion to the Circuit Court in the nature of a writ of error coram nobis, supported by affidavits, to vacate a judgment order entered by the court at a previous term, the cause being in that court upon an appeal from the Probate Court of Cook County. A motion, supported by affidavits, was filed by the claimant to strike said motion, and the court upon consideration of the motions and the affidavits, found it had jurisdiction of the parties and the subject matter, and ordered that the defendant's motion be denied and claimant's motion to strike sustained.

From the facts in the record, supported by affidavits, it appears that the claim was allowed in the Probate Court on February 28, 1934, in the sum of $83.25; that the claimant thereupon appealed to the Circuit Court by filing her appeal bond in the Probate Court of Cook County, and the transcript of the Probate Court was filed by the Clerk of the Circuit Court.

The claim was in this court on a prior appeal in the case entitled Atkinson v. Estate of Gough, 284 Ill. App. 85, and an opinion was filed in which we held that appeals from orders of the Probate Court may be filed with either the clerk of the Probate Court or Circuit Court and if perfected in the former, the attorney for the estate must follow the appeal without further notice, but if filed in the Circuit Court the opposing party is summoned the same as in any lawsuit. In the discussion of the facts in that case we said:

> "The motion of the attorney for the defendant further sets forth that the judgment was entered for $743.45 in favor of the plaintiff 'through the excusable mistake of said administrator and his attorney and through the negligence of the clerk of the Circuit Court of Cook County, Illinois, and through the fraud of counsel for the claimant herein, Anna Atkinson, which if the Court had had knowledge thereof, neither the default nor the judgment would have been entered.'
>
> Nowhere in the motion does it allege or explain what the excusable mistake of the administrator was, nor of what the negligence of the clerk of the circuit court consisted, nor the fraud of counsel for the claimant."

Applying the reasoning of the opinion just quoted to the facts in this case, it was the duty of the defendant to follow the appeal in the Circuit Court of Cook County. The defendant contends that the case was placed on the trial calendar of the Circuit Court without notice to defendant, which was in violation of section [illegible] of Rule 45 of the Circuit Court, and the cause was later called for trial on February [illegible], 1935, and on that date the court entered an order allowing claimant's claim for $743.25. The defendant further contends there was misprision of the Clerk of the Circuit Court in accepting the transcript of the Probate Court and in filing the transcript on April 14, 1934, which was after January 1, 1934, when the new rules of the Circuit Court went into effect, and that such filing of the transcript was in violation of Section 2 of Rule 45.

The claimant replies to this contention of the defendant

that the entry of the judgment ex parte did not result from any alleged misprision of the clerk, but did result from the negligence of the defendant, or his attorney, or both, and no relief can be obtained under this motion, which is not addressed to the equitable powers of the court and is not intended to relieve a party from the consequences of his own negligence, and as authority cites the case of Little v. Smith, 4 Scammon, 400, which arose under a statute requiring the justice to file the appeal bond in the Circuit Court within 20 days after his receipt and approval thereof. The court said on page 402:

> "When the party appealing has entered into the appeal bond, and the same is accepted and approved by the justice, the appeal is taken. He has done all which the law requires of him, and what remains to be done, to wit, the return of the papers to the office of the clerk, is to be performed by the justice of the peace. In the performance of this act, which is merely ministerial, the justice is the officer of the law, and not the agent of the party; and consequently the party cannot be held responsible for his neglect. We cannot but think it would be attended with hardship to take from a party the power of performing an act and then dismiss his appeal because the act was not performed."

See also Beardsley v. Hill, 81 Ill. 354; Hartsburg v. Meegan, 237 Ill. App. 295; Rosenberg v. Pritzker, 156 Ill. App. 463. It therefore follows that when the claimant's bond was filed and approved his appeal was properly perfected and filed in the Circuit Court, and as we stated in the case of Atkinson v. Estate of McKeogh, 284 Ill. App. 85, it was the duty of the defendant to follow the appeal without further notice. The defendant, however, seeks to minimize his failure to follow the appeal by contending that a party who relies upon rules of the court being obeyed by the court's own officers cannot be held to be guilty of negligence; nor was the defendant bound to search the files of all cases for an indefinite period, but had a right to expect that the case was not pending since it was not mentioned in the clerk's index.

The defendant did not make a search for a period of 10 months, the time which elapsed between the filing of the transcript in the Circuit Court and the entry of the judgment. He does state in his affidavit that on occasions prior to the entry of the judgment he caused a search to be made of the record in the Circuit Court, but nowhere does it appear when, how and by whom such search was made. From the record before us, if he had made a search after April 14, 1934, he would have found the case indexed.

The rule of law which must be applied and followed in considering a motion of the character pending here appears in Cramer v. Commercial Men's Ass'n., 260 Ill. 516, where the court said:

> "The error in fact which may be assigned under the motion must be some fact unknown to the court which, if known, would have precluded the rendition of the judgment. The rules were of record in the court and must necessarily have been of record to have any validity. * * *. Courts take judicial notice of their own records, * * * and the records are always constructively before the court. Under the well-settled law these rules were before the court and judicially known when the orders were made and the judgment entered, and could not, therefore, be made known to the court as errors in fact of which the court was ignorant."

So the argument of the defendant that failure of notice to place the cause on the calendar was a violation of the rules cannot be made upon the ground that the court was ignorant of the existence of the rules and the law. However, in this case the rule does not apply, for, as stated in this opinion, it was the duty of the defendant to follow the appeal.

The defendant admits in his concluding statement that the matter of utmost difficulty is whether the former decision of this court is a bar to relief, and suggests if a bar it was waived by the failure of the claimant to make a motion in the nature of a demurrer.

However, the reply of the claimant is that under Section 48 of the Practice Act (Ch. 110, Par. 172, Ill. St. Bar Stats. 1935)

it is expressly provided that motions to dismiss an action or suit may be filed where any of the enumerated defects appear on the face of the complaint, and that where any of the said defects exist but do not appear upon the face of the complaint the motion shall be supported by affidavit. One of the enumerated defects which can be taken advantage of in that manner is: "That the cause of action is barred by a prior judgment," and the claimant contended that the prior decision of the court is res adjudicata and conclusive of all issues in this case, and made a motion, supported by affidavit, to dismiss the action, and set up in support of her contention that many of the matters now before this court were before the court when it filed its prior opinion.

It appears from the prior motion of the defendant that "he examined the records in the office of the Clerk of the Circuit Court of Cook County on several occasions, but was unable to discover that said appeal had ever been perfected owing to the misspelling of the said Catherine McKeogh on the record of the said Clerk of the Circuit Court of Cook County, Illinois." The claimant contends that if this statement was improperly raised in the first motion or if it was not raised at all, it is barred by the former decision of this court because he says he acquired knowledge thereof on April 11, 1935, and therefore it was known to the defendant at the time he filed his first motion, and cites in support of her position the case of Merriman v. Gillespie, 250 Ill. 360, in which the court said:

> "While it is true the homestead question here raised was not properly raised in the former litigation, it could have been so raised, as Bowman was a party. The doctrine of res judicata extends not only to every matter that was determined in the former suit, but to every other matter that might have been raised and determined."

Claimant further cites the case of Godschalck v. Weber, 247 Ill. 263, where the court said:

> "The doctrine of res judicata extends not only to the questions which were actually decided in the former case, but to the whole controversy, - to all matters properly involved which might have been raised and determined, and to all grounds of recovery or defense which the parties might have presented, whether they didso or not."

Also the case of Webb v. Gilbert, 357 Ill. 340.

From the authorities cited it would seem that the question raised by the defendant here could have been raised by him in the former proceeding, and that he is not permitted to again litigate the same question.

We believe from the views expressed in this opinion that the court acted properly in deciding as it did, and there being no error in the record we are of the opinion that the alleged errors are not such as would justify a reversal of the order of dismissal. The order is accordingly affirmed.

(O.) AFFIRMED.

DENIS E. SULLIVAN and [illegible], JJ. concur.

39463

THE [illegible] COMPANY OF [illegible], a corporation, as Admr. of the Estate of Clarence Hawkins, deceased,

Plaintiff-Appellant,

v.

FRANK McDERMOTT, doing business as the McDermott Brewing Company, et al.,

Defendants-Appellees.

[illegible] APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY.

293 I.A. 621

MR. [illegible] JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

The plaintiff Trust Company, administrator of the estate of Clarence Hawkins, deceased, appeals from the judgment entered on the 16th day of December, [illegible] A. D. 1936, dismissing the case as to the defendant McDermott Brewing Company, a corporation, and dismissing the suit of the plaintiff as to Frank McDermott, doing business as McDermott Brewing Company, and Hugh Johnson, defendants.

The complaint filed by the plaintiff alleges that on January 5, 1935, plaintiff's intestate died by reason of having been struck by a truck driven for the McDermott Brewing Company on December 13, 1934.

On April 19, 1935, the plaintiff filed its suit to recover damages for the death of plaintiff's intestate, and summons was issued for service on the McDermott Brewing Company, a corporation. The McDermott Company filed an answer reading in part as follows:

> "It denies that on or about the 13th day of December, 1934, it was engaged in the business of transporting goods and merchandise, and denies that it at the time operated certain trucks upon and over the streets of the City of Chicago, Illinois. Defendant further denies that there is any firm or legal entity in existence bearing the name McDermott Brewing Company, a corporation."

On May 7, 1936, leave having been granted, the plaintiff filed an amended complaint, making Frank McDermott and Hugh Johnson additional parties defendant, to which amended complaint they filed an answer, stating, in part -

"Defendants aver that this action is one for the death of a person allegedly caused by the wrongful acts, negligence or default of the defendants; that said action was not commenced against the defendants, Frank McDermott and Hugh Johnson or either of them within one year after the death of such person, that plaintiff's intestate, Clarence Hawkins, died as a result of his injuries on January 5, 1935; that said action was not commenced against the said defendants or either of them until May 7, 1936."

Upon the issues being joined, the cause came on for trial on or about December 3, 1936, and each of the defendants made a motion in writing at the close of all the evidence requesting that the court withdraw the case from the jury and direct a verdict for the respective defendants. The court allowed said motion as to the defendant McDermott Brewing Company, a corporation, and instructed the jury to find the defendant McDermott Brewing Company not guilty.

It further appears from the record that on December 4, 1936, after the cause had been submitted to the jury, it was unable to reach a verdict and on December 7, 1936, the court discharged the jury from further service.

Subsequently, on December 16, 1936, the defendants Frank McDermott and Hugh Johnson moved that they be given leave to withdraw their answer, and in lieu thereof filed their motion to dismiss the complaint pursuant to Section 48 (f) Ch. 110 of the Civil Practice Act, (Ill. St. Bar Stats. 1935) on the ground that it appeared from the face of the complaint that more than one year had elapsed after the death of the plaintiff's intestate and before an action was instituted against these defendants.

One of the points made by the plaintiff is that the court was without jurisdiction to dismiss the defendant McDermott Brewing Company upon its plea of <u>nil tiel</u> corporation, for the reason that this corporation filed its general appearance, and thereby the court was given jurisdiction, and it was admitted by the defendant that it was a corporation.

On December 16, 1936, the court entered an order, nunc pro tunc as of December 4, 1936, in favor of the defendant McDermott Brewing Company, and a report of the proceedings not having been signed by the court and made a part of the record, we are unable to determine whether by its instruction to find the McDermott Brewing Company not guilty the court erred in entering the judgment.

In the case of Kvenicki v. St. Olive & Staunton Coal Co. 223 Ill. pp. 33, this court held:

> "When the court directs the jury as to the verdict to be returned, it is not necessary that a verdict be actually written out and signed by the jury and returned into court."

We approve this language of the court and adopt it in support of the action of the trial court in entering judgment in the instant case.

The defendants Frank McDermott and Hugh Johnson, on December 16, 1936, moved that they be given leave to withdraw their answer in the case and to file in lieu thereof a motion to dismiss these defendants, which motion was allowed, for the reason that it appeared from the face of the complaint that more than one year had elapsed after the death of the plaintiff's intestate and before the action was brought against these defendants. Plaintiff's intestate died on January 5, 1935, and no action was instituted against Frank McDermott and Hugh Johnson until May 7, 1936, one year and four months after the death of plaintiff's intestate. In this case the action against these two defendants is controlled by Ch. 70 Sec. 2 of the Injuries Act. (Ill. St. Ann. Stats. 1937), which provides as follows:

> "Every such action shall be commenced within one year after the death of such person."

From the defendants' motion, which is in the nature of a demurrer to the amended pleading, it appears the action against them was commenced after the one year period provided for the instituting of such suit.

The plaintiff makes the point that where the plaintiff brings its action within the statutory period as to one of the defendants and later amends so as to join others, the pleading so amended relates back to the date of the filing of the original pleading.

In considering the question the Supreme Court in the case of Gay v. Walcott, 361 Ill. 437, said that the plaintiff must comply with the provisions of the Injuries Act if he desires to avail himself of its provisions, and he must bring himself within its terms; that an amended complaint when not filed within the time required by statute for instituting such action, does not relate back to the time of the filing of the original declaration. The court also said:

> "The amended declaration set up a different state of facts as to the exercise of care upon the part of the deceased. It can not be said that the original declaration either stated a cause of action imperfectly or defectively, because it stated no cause of action at all. By its distinct averments it admitted contributory negligence and want of due care of the deceased. This court has uniformly held that if a plaintiff desires to avail himself of the provisions of the Injuries Act (Ishill's Stat. Chap. 70, sec. 2,) he must bring himself within its terms and provisions. Hartray v. Chicago Railways Co. 330 Ill. 85; Bishop v. Chicago Railways Co. 303 Ill. 273; Berlin v. Peerless Gas Light Co. 297 Ill. 142."

The rule is controlling in the instant case for the very good reason that suit was not instituted against the two defendants McDermott and Johnson until after the time had elapsed within which to institute an action of the character before us. Therefore the court properly permitted these defendants to withdraw their pleading, and allowed the motion of the defendants to dismiss the proceeding against them on the ground that they were not properly brought into court within the time provided by the Injuries Act. The judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39555

MARY S. NIGHT, ADELE S. DEEGAN, JOHN . DE GAN, ROBERT S. FORD, CLYDE V. FORD, FRED S. SMITH, CLOA M. SMITH, ZACHARY D. FORD, WILLIAM D. FORD, ZACHARY D. FORD, JR., and MARISSA FORD HAYES,	)	APPEAL FROM
Appellees,	)	CIRCUIT COURT
v.	)	COOK COUNTY.
CITY OF CHICAGO, a Municipal Corporation,	)	
Appellant.	)	293 I.A. 621

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

Plaintiffs' action against the City of Chicago is for damages alleged to have resulted to their property because of the construction of a local improvement. Upon a trial the case was submitted to the jury and a verdict was returned in favor of the plaintiffs and against the defendant in the sum of $18,167. After denying motion of the defendant for a new trial the court entered judgment against the City of Chicago in the above amount.

From the facts in the record it appears that East Illinois street is a public street extending in an easterly and westerly direction in the City of Chicago; that North Wabash avenue is a public street extending in a northerly and southerly direction in the City; that plaintiffs are the owners of property commonly described as 50-52 East Illinois street in the City of Chicago; that the west line of the property is 100 feet east of the east line of North Wabash avenue and the property has a frontage of 50 feet on the north side of East Illinois street.

The local improvement out of which this action arose consisted of the construction of a viaduct on Wabash avenue to meet the level of a new bridge across the Chicago River, which is south of East Illinois street. This also involved the lowering of the level of East Illinois street by depressing it sufficiently to provide

the necessary clearance for traffic passing under the new level of Wabash avenue. At the east line of the plaintiffs' property, East Illinois street was depressed about two feet eight inches, and at the west line about four feet eight inches below its old level. There was no change made in the level of the sidewalk in front of the plaintiffs' property. An iron railing about three feet six inches in height was placed on top of the retaining wall along the curb for the protection of pedestrians. This railing extended across the entire front of plaintiffs' property and a little beyond its east line. In the rear of plaintiffs' premises there is an 18 foot alley. The elevation of the upper level of Wabash avenue at the point where it intersects this alley is about 40 inches above the old level, and to meet the new level only a slight slope extending 25 or 30 feet from the intersection was necessary.

At the time of the construction of this local improvement the property of the plaintiffs consisted of a brick building used as a rooming house. It contained eight flats of six rooms each.

The plaintiffs introduced two witnesses who testified as to their opinion concerning the amount of the damage to the plaintiffs' property. One placed the damage at $31,500, and the other at $30,000. Three witnesses testifying for the defendant stated what in their opinion was the extent of the damage to the plaintiffs' property, and all placed it at $3,000. Donald T. Morrison, one of the witnesses for the defendant testified in part as follows:

> "At your request, I made an examination and investigation, in order to appraise the property in question, which examination consisted of consulting the Map Department as to location and size of lot and alley connections, and the Building Department record as to access of the building; checking the record in the County Assessor's office; consulting the records in the County Treasurer's and County Clerk's offices as to general taxes and the Recorder's office on recent sales. I also made an inspection of the premises, the area of the lot and the change made by the erection of the

Wabash avenue bridge and approach and obtained all local information that I thought was necessary as to trucking facilities and the use of both upper and lower levels on Wabash avenue. I made a study of the rents of some fifteen warehouses in the District, both dry and cold storage."

The City contends that notwithstanding the witness Morrison had not testified that what he found in the records in the office of the Assessor of Cook County, Illinois, formed any part of the basis upon which he estimated the damage to the plaintiffs' property, counsel for the plaintiffs was permitted over objections of the defendant to introduce in evidence the valuation found upon the Assessor's records. Plaintiffs' exhibit No. 9 shows the records of the office of the Assessor, which disclose among other things the area and cubic dimensions of the building on the property; that the building was 51 years old when the construction of the local improvement was commenced and 52 years old when the construction was completed; that it contained 56 rooms, 6 toilets, 8 bathrooms and 8 fireplaces; that the floors were constructed on wooden joists; that the basement covered the complete area of the building and had a dirt floor; that the interior finish of the building was of pine wood as well as hardwood; that the building was lighted by gas lamps, had a stone foundation, a flat roof and that the covering of the roof was of tar and gravel.

The records in the office of the Assessor of Cook County, Illinois, which were introduced in evidence, show that on the Assessor's records for 1930 the plaintiffs' land was valued at $53,540, the building thereon at $30,848, making a total valuation of $74,488, and that the Assessor's valuations for 1931 were $34,585 for the land, $4,802 for the building, making a total valuation of $39,387, showing a decrease in valuations on the Assessor's records of $45,101 as between the two years in question.

The court instructed the jury, over the objection of the defendant, as to the consideration the jury should give to this evidence as follows:

> "The court instructs the jury that you should not take as conclusive evidence of value in this case, the value placed upon the property xxxxxx by the Assessor of Cook County, Illinois."

and the City of Chicago urges upon this appeal that the records of the Assessor of Cook County, Illinois, showing the valuation placed by him upon the plaintiffs' property for purposes of taxation, were not competent evidence of the fair cash market value of plaintiffs' property as against the defendant city, and cite in support of its contention the case of American Steel & Copper Plate Co. v. Silter, 200 Ill. App. 175. In that case the court held that where property has a market value evidence as to its assessed valuation is incompetent and immaterial. The defendant also cites the case of Lewis v. Englewood Elevated R. R. Co., 223 Ill. 223, wherein there was involved a condemnation of land occupied by store buildings for the right of way of an elevated railroad. The Supreme Court held that it would be improper to introduce as evidence the Assessor's statement of value as shown by a tax receipt. The court upon this question said:

> "The assessor himself might have been a competent witness, but his statement of value as shown by a tax receipt was not competent. Both reason and weight of authority are against the competency of this evidence. (Dudley v. M. & M. C. Ry. Co. 77 Iowa, 412; Brown v. Railroad Co. 5 Gray, 40; Texas and St. Louis Railway Co. v. Eddy, 42 Ark. 527; 10 Am. & Eng. Ency. of Law, - 2d ed. - 1154; Lewis on Eminent Domain, sec. 448; Mills on Eminent Domain, sec. 172.) That such evidence is of a character liable to have an important influence on the jury cannot be doubted."

The opinion of the Supreme Court in the case of County of Mercer v. Wolff, 237 Ill. 74, was to a like effect concerning the admissibility in evidence of the Assessor's records.

While this is the general rule governing the admissibility of evidence of the character offered in this case, still the question here is whether the evidence introduced was of such a prejudicial

nature as to mislead the jury. When we come to examine the record we find the verdict of the jury for the sum of $12,187 was within the range of the prices testified to by the real estate experts who testified for both sides of this litigation.

The reply of the plaintiffs to the error complained of by the defendant City is that an examination of the cases called to the attention of this court by the defendant discloses that in all of these cases the plaintiffs testified on direct examination for the purpose of sustaining the allegations in their bill of complaint on the question of damages; that the plaintiffs in the instant case did not offer any evidence on direct examination as to the records of the Assessor's Office of Cook County as to values, and contend that it was the defendant's own witness, in response to interrogatories by the defendant's counsel, who testified that he examined the records in the County Assessor's office, the records in the County Treasurer's office and the County Clerk's office as to general taxes for the purpose of enabling him to appraise the property in question. The plaintiffs further suggest that the admission in evidence on rebuttal of the official records on file in the office of the Assessor of Cook County was proper if for no other reason than for the purpose of impeaching the witness Morrison and for its effect on his credibility as a witness, and as we have already stated, the verdict of the jury, in view of the testimony and the fact that they personally inspected the premises, was reasonable in amount and is supported by the evidence heard on the trial of the case.

In discussing the instruction quoted in our opinion, the Supreme Court in Sanitary District v. Pittsburgh, Ft. Wayne and Chicago Ry. Co. et al., 216 Ill. 575, makes this interesting comment:

> "On the question whether a return for taxation is admissible in evidence as tending to show the value of property there is a conflict of authority, and we do not express any opinion upon

> the subject, but they are not held, in any case, to be a criterion of value or conclusive. The returns did not purport to be made by the owner of the property and therefore had no force as admissions of value, and whether admissible in evidence or not, there was no error in giving the instruction to the effect that they were not conclusive."

This comment has a bearing upon the questioned instruction. We think from the whole record the verdict of the jury is supported by the testimony, and, as we have already said, was within the range of the prices testified to upon the trial.

For the reasons stated the judgment is affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39585

JESSE W. COLEMAN, JAMES H. GAITHER, MOSES CHADWICK and JOHN H. PRICE, Pastor and Trustees of Second Baptist Church of Maywood, a corporation, and SECOND BAPTIST CHURCH OF MAYWOOD, a corporation, (Plaintiffs) Appellees, v. CLYDE W. SLAUSON, ROBERT GRAHAM and WALTER ROUNDTREE, Trustees and Deacon of Second Baptist Church of Maywood, a corporation, (Defendants) Appellants.	APPEAL FROM CIRCUIT COURT COOK COUNTY. 293 I.A. 622

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the defendants from a decree entered by the court on April 5, 1937, and as modified on April 8, 1937, wherein the court found it had jurisdiction of the subject matter and of the parties thereof; that the equities are with the plaintiff, and decreed that the defendants, their agents, solicitors, and attorneys be permanently and perpetually restrained and enjoined from in any manner or way molesting, hindering and interfering with or preventing the plaintiffs, Rev. Jesse W. Coleman, James H. Gaither, Moses Chadwick and John H. Price, from performing their duties as pastor and trustees of the Second Baptist Church of Maywood, a corporation; and from holding any meetings calculated to destroy and prevent the orderly functioning of the plaintiffs in their duties as pastor and trustees of the church; and from further withholding the keys to the church from the Rev. Coleman, and from further attempting to oust him from the pastorage of the church.

This decree was based on the amended and supplemental complaint filed April 2, 1936, to which the defendants filed an amended answer, and the cause was thereupon referred to a Master in Chancery. Pursuant to the order, testimony was heard before the Master, and at the conclusion of the hearings the Master filed his

report, wherein the Master recommended that the court grant an injunction as prayed for against the defendants. Objections were filed and overruled, the same to stand as exceptions. After a full hearing before the court on the exceptions to the Master's report, the court entered a decree granting the injunction.

In discussing the argument of the defendants below, the court is without the aid of a brief filed by the plaintiffs, so the subject will have to be discussed from the standpoint of the defendants in their brief, who appeal from the decree enjoining them from doing the several things mentioned in the decree.

The first question we will consider is whether the court had jurisdiction of the subject matter of the controversy presented to the court. It is well established by authorities, not alone in this State but in the several states, that the courts cannot interfere with the discipline of the church, either with its members or its officials, and that they have no jurisdiction of religious or ecclesiastical controversies. One of the cases called to our attention is that of Russell v. Hall, 233 Ill. 73, where our Supreme Court held that a court of chancery had no jurisdiction of the subject matter of the controversy in the case, and it was said by the court:

> "The object of the bill is to have a court of chancery, by its process, assume control of the action of an ecclesiastical tribunal, declare the extent of its jurisdiction, examine the regularity of its proceedings and revise its judgments. The civil courts deal only with civil or property rights. They have no jurisdiction of religious or ecclesiastical controversies. Our constitution says: 'The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed.' Such freedom of religious profession and worship cannot be maintained if the civil courts may interfere in matters of church organization, creed and discipline, construe the constitution, canons or rules of the church and regulate and revise its trials and the proceedings of its governing bodies. * * * ; but if tyranny, force, fraud, oppression or corruption prevail, no civil remedy exists for such abuse except where it trenches upon some property or civil right. The ordinary courts have no cognizance of the rules of a religious organization or other voluntary association, and cannot consider whether they have been rightly or wrongly applied."

In an earlier case entitled Chase et al.v. Cheney, 58 Ill. 509, the court in passing upon the subject we now have under consideration said:

> "The minister, in a legal point of view, is a voluntary member of the association to which he belongs. The position is not forced upon him, he seeks it. He accepts it, with all its burdens and consequences; with all the rules and laws, and canons then subsisting, or to be made by competent authority; and can, at pleasure and with impunity, abandon it. If they were merciful and regardful of conscientious scruples, he knew it; if they were arbitrary, illiberal, and attempted to chain the thoughts and consciences, he knew it. They can not, in any event, endanger his life or liberty; impair any of his personal rights; deprive him of property acquired under the laws; or interfere with the free exercise and enjoyment of religious profession and worship, for these are protected by the constitution and laws. * * * 'The only remedy which the member of a voluntary association has, when he is dissatisfied with the proceedings of the body with which he is connected, is to withdraw from it.' Forbes v. Eden, (infra.)'"

Applying the theory expressed in the cases from which we have above quoted, the court was in error when it permanently enjoined the defendants from taking such part as they deemed necessary in order to carry out the purposes for which the church was organized. In matters of this kind the principal question to be considered is that of injury to property rights. Plaintiffs' claim does not involve a civil or property right, and from anything we have found in the record it does not appear that the defendants have interfered with any of the property rights of the plaintiff and his associates. Under the authorities, which seem to be in accord upon this subject, the plaintiff Coleman's right as pastor to the Second Baptist Church of Maywood, did not constitute a property or civil right, and if the members of the church regarded it necessary that plaintiff Coleman as pastor of the church be dismissed, this was a matter over which the church members had control, and the courts will not interfere with the discipline exercised by the church members.

Under the law there is no fact here which would justify the entry of the permanent injunction which prevented the officers as well as the members of the church from exercising the rights they had under their church organization.

For the reasons stated the decree entered by the court was erroneous, and it is therefore reversed, including the order that a permanent injunction be entered.

DENIES REVERSED.

HENRY E. SULLIVAN AND HALL, JJ. CONCUR.

39353

LAMBERT & NAHM [illegible], a Corp.,

Appellee,

v.

INDIVIDUAL FUEL & [illegible] CO., a Corp.,

Appellant.

54

293 I.A. 622

[illegible] JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

This is an appeal by defendant from a judgment against it for the sum of $1,5[illegible], entered in the Municipal Court of Chicago on July 8, 1938, in an action brought by plaintiff against defendant to recover for labor and materials furnished by plaintiff to defendant in the installation of an oil burner on defendant's premises. The trial was before the court without a jury.

The complaint filed in the cause charges, in substance, that on or about June 4, 1937, plaintiff submitted a proposal to defendant to furnish defendant cert in labor and materials for the installation of an oil burner on defendant's premises, and that on June 30, 1937, plaintiff supplemented the first proposal. Both the original and supplemental proposals were in the form of letters from plaintiff to defendant. It is further alleged that on June 30, 1937, defendant accepted the proposals and executed a contract of which the two proposals were made a part; that plaintiff, in accordance with the terms of the contract, furnished labor and materials for the installation of the oil burner and equipment, as called for by the contract; that on or about November 11, 1937, plaintiff completed the furnishing and installation of the oil burner and equipment, in accordance with the directions, orders, instructions and requirements of defendant, and in accordance with the contract, all of which was accepted and approved by the defendant; that there is due the plaintiff from defendant the sum of $1,941.67, there having been paid the sum of $257.00 on account; that in addition to the amount of

$1,941.67, there is due plaintiff from defendant the sum of $1,013.57 for work, labor and materials which were necessitated by reason of the defendant failing to install a boiler of the proper and agreed capacity, and that the same were furnished at the specific instance and request of the defendant, and were not included in the work, labor and materials to be furnished in accordance with the original contract; that the charges for the labor and materials furnished, were the fair, reasonable and customary market charges for the labor and materials as of the dates furnished, and that defendant has approved all of the work and has agreed to pay the charges above set forth; that there is due the plaintiff from the defendant the sum of $2,955.24, which sum the defendant has repeatedly promised to pay, but failed to do so.

Defendant filed an affidavit of defense and a counterclaim reciting, in substance, that it admits the execution of the contract, but denies that plaintiff furnished labor and materials in and about the installation of the oil burner, and equipment as called for by the contract; denies that on or about November 11, 1933, plaintiff completed the furnishing and installation of the oil burner and equipment in accordance with the directions, orders, instructions and requirements of defendant; denies that work was in accordance with the contract and that the installation of the work was ever accepted or approved by defendant; states that plaintiff did not comply with any of the terms of the contract; that the burner plaintiff installed failed to burn oil efficiently and failed to give consistent performance; that plaintiff failed to cooperate with the defendant in the installation of the oil burner and failed to connect an adjustable air register with high pressure control so that a constant ratio between oil and secondary air for combustion was maintained; that plaintiff failed to notify defendant that the burner was completely installed, and that the installation was complete; that plaintiff was advised

many times th t its delay in securing a consistent operation was causing considerable distress financially to defendant, but that plaintiff was indifferent to this advice; th t plaintiff failed to cover the hot oil pipes; th t plaintiff accepted the contract knowing that the boiler was set in a temporary position and th t it later would be required to change its installation when the permanent position was finally ready, and gave its consent to operate in a temporary position where the surroundings would be somewhat different than would be when the boilers were permanently located; that in accepting such a condition, defendant expected th t the plaintiff would fit its burner to the conditions; that plaintiff was given every consideration at all times, but refused flatly to make a statement, after plaintiff's trial runs showed that its burner was not burning oil efficiently, as to just what could be expected of its burner and just when plaintiff would be able to complete the installation, and that plaintiff left the job of its own accord; denies that there is due plaintiff the sum of $1,641.67, and admits that it paid plaintiff the sum of $257.00 prior to the doing of any of the work on said contract, and is demanding the return of the said $257.00 as part of its counterclaim filed herein; denies th t there is due an additional $1,013.67 to plaintiff; states that said sums were expended by reason of the inability of plaintiff to give performance, due to the inferior workmanship and inadaptability of the oil burner that plaintiff attempted to install, and th t all of said work were extras which were never authorized by defendant; denies that plaintiff is entitled to any money or moneys whatsoever, but that the inability of plaintiff to furnish the burner as contracted caused the defendant losses of many thousands of dollars; denies th t said work, labor and material were necessitated by reason of defendant's failing to install a boiler of proper capacity; denies

that said expenditures were furnished at the specific instance and request of the defendant; denies that the charges for said labor and material were the fair, reasonable and customary market charges; denies that the defendant approved all of said work and agreed to pay said charges; denies that there is due plaintiff from defendant the sum of $2,355.24, and that it repeatedly promised to pay the same, but states that defendant has repeatedly demanded of plaintiff the sum of $4,513.57 on account of damages suffered by it, due to the inefficient machinery or oil burner attempted to be installed.

The record indicates that prior to June 4, 1933, one J. Weston of defendant company stated to H. A. Crews, then engineer of the plaintiff company, that defendant was in the market for a 350 horse power oil burner to develop 300% rating, and that thereupon Crews gave Weston, for defendant company, a price on such burner, and that thereafter plaintiff, on June 5, 1933, delivered to defendant the following document, the first of the letters hereinbefore referred to:

"June 5, 1933.

Individual Towel & Cabinet Co.,
33rd & Cottage Grove Ave.,
Chicago, Ill.

Gentlemen:

We propose to furnish and install Hammert System of Oil Burning Equipment in the 3 - 350 H. P. Scotch Marine Boilers which are to be set in your plant at the above address.

Our combination heavy duty steam atomizing nozzle and adjustable air register as shown on Page 'M' of our catalog will be provided for each of these boilers. High pressure mechanical atomizing nozzles will be provided for each of these registers and may be used interchangeably with the steam atomizing nozzle when desired.

Combustion orifice will be built in each of these boilers as shown on attached blue print.

A short steel shell extension will be built on the front of each combustion tube to hold refractory materials so as to make available all of the heating surface in the combustion tube.

Pumps will be provided in duplicate, either pump having a capacity considerably in excess of your maximum requirements with both boilers operating at 200% rating. These pumps will be one motor driven or one steam driven or one of each will be provided as you desire.

Motor driven pump will be provided with Allen-Bradley

or approved equal switch having low voltage release and overload relay.

American Marsh steam driven pump will be provided with pressure governor. Hills McCanna forced feed lubricator or approved equal.

Heavy duty quick cleaning strainers will be provided in duplicate, cross connected, so that either strainer may be cleaned while the other is in service without interruption to firing.

High-low pressure control will be provided, controlling both the oil and secondary air for combustion through the operation of the front air register, so that a constant ratio is maintained between the amount of oil being burned and the amount of air admitted for combustion, thus maintaining a constantly high CO2 on both high and low fire.

Proper oil relief valves will be provided.

Steam reducing valve will be provided to reduce steam to proper pressure for efficient combustion.

Oil heaters will be provided in two units to heat oil to proper temperature for efficient combustion. Paco Figure F-42 will be provided.

Steam traps will be provided to take care of condensation from the oil heater.

National oil meter will be provided, registering the amount of oil burned.

All hot oil pipes and steam pipes will be covered, using 85% magnesia or approved equal covering.

All pipe work, brick work, electrical connections and everything necessary for a complete operating installation will be provided by us.

Suitable concrete foundation will be built for pumps.

This proposition contemplates that you will bring oil pipes across alley to the inside of boiler room wall.

It is our understanding that one of these boilers will be set in a temporary location while the old boilers are being removed and new ones set. We will provide temporary setting for this boiler during construction work and reset proper equipment on this boiler when it is placed in final location.

All of the above we will provide for the sum of TWO THOUSAND NINE HUNDRED EIGHTY TWO ($3,982.00) DOLLARS.

We will guarantee this equipment to be free from defects in material and workmanship, and will remedy any such defects within one years time without cost to you.

We guarantee to develop 200% of the rated capacity of these boilers with a draft of .6 available at uptake.

We guarantee to evaporate 15 lbs. of water from and at 212 per pound of fuel having a B. T. U. content of 18,500 between ratings of 75% and 165%. We guarantee that a CO2 of 14% can be maintained between these ratings with no more than a slight haze in the stack.

We call your special attention to the construction of our adjustable air register and the combustion orifice. We have given a great deal of study to this combination specially as related to Scotch Marine Boilers, and we know that our method of obtaining the proper turbulency and mixture of gases in combustion is in advance of anything being offered.

We call your attention to a weighed water and oil evaporation test made on a Scotch Marine Boiler set in this same manner. You will note that an evaporation of 15.88 was made at 167% rating, and that a maximum of 237% rating was made.

Our equipment is designed to burn the heaviest grades of oil and will efficiently handle any oil that can be pumped from your storage tanks. We are efficiently handling on many installations, oil running below 5 gravity. It is, of course, necessary to keep this oil warmed up in the tank in order to pump it, but we are burning it successfully and obtaining high evaporations from it.

Hoping to receive your favorable consideration, we are

Yours very truly,

LOCKETT & WARD COMPANY

H.C.:JB By: H. C. Crews

Construction: Work to be completed on or before completion of installation of boilers.

Terms: 12-1/3% on delivery of equipment
12-1/3% after completion and satisfactory tests made on shipment
Balance to be spread over a 15 month period, i.e. 15 equal payments.

Respectfully submitted,

Accepted this __ day of__1933 By:_____

Apex Blbg. Co.
Jack J. Solomon"

On June 30, 1933, plaintiff delivered to defendant the following letter, being the second of the letters referred to:

"June 30, 1933.

Individual Towel & Cabinet Service Co.,
3258 Graves St.,
Chicago, Ill.

Gentelmen:

Referring to our proposal covering the installation of oil burner equipment in your plant for the sum of TWO THOUSAND NINE HUNDRED EIGHTY TWO ($2,982.00) DOLLARS (not including finance fee), it is understood that this contract is split as follows:

TWO THOUSAND EIGHT ($2,008.00) DOLLARS covering the installation for the first boiler and NINE HUNDRED SEVENTY FOUR ($974.00) DOLLARS covering the installation on the second boiler. It is understood that in case of a change in plans within thirty days of completion of first unit by which coal might be used on the second boiler, the second contract of NINE HUNDRED SEVENTY FOUR ($974.00) DOLLARS may become null and void at your option, or if a different type of boiler than the Scotch Marine Boiler at present contemplated should be used on the second boiler, there may be an adjustment in this second price of NINE HUNDRED SEVENTY FOUR ($974.00) DOLLARS, depending on whether the cost of installation in this second boiler may be more or less. This item is dependent largely on whether more or less fire brick might be used, which we expect to run approximately 500 brick in case of the Scotch Marine Boiler. In the mean time you are protected at present market prices to the extent of NINE HUNDRED SEVENTY FOUR ($974.00) DOLLARS on the second burner.

Assuring you of our desire to cooperate with you in every reasonable way for your best interests, we are

Yours very truly,

[illegible]

HM:Jb By: [illegible]

Contemporaneously with the delivery of this last letter the following document was executed by defendant:

"Form Approved by Chicago Oil Burner Association

To Lammert & Mann Company, Chicago, Illinois June 30, 1933
215 No. Wood St., Chicago, Ill.

Please furnish and install only in building by me at No. 3228 Graves St., Chicago, Ill. one Lammert system of Oil burner together with equipment described as follows: as per proposal dated June 5th, 1933 attached and supplemental letter of June 30th also attached.

The seller agrees to make installation of the above described oil burner and equipment at the above mentioned premises on or about August 10th, 1933.

The Buyer agrees to pay the seller, his, its or their successors or assigns, the sum of TWO THOUSAND ONE HUNDRED NINE DOLLARS SIXTY SEVEN CENTS, $2,109.67, as the purchase price of said oil burner and equipment, payments to be made as follows: $251.00 on delivery of equipment, $251.00 upon completion of the installation of said oil burner and equipment, and a note for $1,607.67, payable in nine instalments of $178.63 each, which note is not given in payment of this obligation, but merely as evidence thereof.

The buyer hereby agrees that the holder of said note may detach same from this agreement and enforce all rights thereunder the same as though this agreement were not attached thereto. The remedy afforded by enforcing payment of said note shall be cummulative with all other remedies of the legal holder hereof.

It is understood and agreed that title to said oil burner and equipment shall at its, his or their option remain in the Seller, its, his or their successors or assigns until the entire purchase price thereof is paid in cash. It is further understood and agreed that the Seller, its, his or their successors or assigns may waive its, his or their option to retain title without notice by filing claim for or mechanic's lien or otherwise.

In event of the non-payment of any of the amounts due hereon as above recited, or in the event that the buyer shall fail to comply with any of the provisions of this contract, then the entire amount due hereon shall at once become due and payable without notice or demand, and the Seller shall be entitled to retain as liquidated damages any and all payments made hereunder.

All loss or damage to or by the oil burner or equipment arising from the use or installation of the same shall be borne by the Buyer.

The purchase by the buyer of Oil storage equipment together with installation charges for same represent a separate and distinct purchase from any and all other equipment sold to the Buyer, and shall in no way be deemed a part of other equipment to which it may be attached.

It is further expressly understood and agreed by the parties hereto that no agreements, warrantees or representations, either verbal or written, expressed or implied shall be binding

upon the Seller, its, his or their assigns other than those herein contained. It is further understood and agreed that this contract is contingent upon strikes, fires, accidents, or other delays unavoidable or beyond reasonable control, and is binding upon the Buyer immediately upon execution, and on the Seller when approved by the Seller. Receipt of a copy of this contract is hereby acknowledged by the Buyer.

[illegible] TO [illegible] VIC. CO.

Sam Wolf, President.
Buyer"

The record indicates that the words "As per proposal dated June 5th, 1933, attached and supplemental letter of June 30th, also attached", contained in that document, refer to the two letters from plaintiff to defendant hereinbefore set forth. The Apex Plumbing Company, which by Jack Solomon, accepted plaintiff's proposal, was, on behalf of plaintiff, in charge of the entire installation of a new power system being constructed for plaintiff.

In this appeal defendant urges that the oil burner furnished by plaintiff "was not in accordance with the terms of the contract and was not fit for the intended use and purpose;" that the installation of the oil burner was in violation of the Smoke Prevention Ordinance of the City of Chicago, that a party suing at law on a written contract, alleging performance thereof, can only recover by proving strict performance, and that there is a material variance between the contract set out in the statement of claim and the contract proved at the trial. Plaintiff, on its part, contends that if there was any failure of the oil burner installed by it to function, it was because of the fact that the two boilers installed by defendant in its plant, instead of being 350 horse power Scotch Marine Boilers, were 217 rated horse power boilers. To this defendant replies that at a meeting held between various persons including representatives of both plaintiff and defendant on June 5, 1933, the date of the execution of the contract between the parties, a man named Davis, representing the Titusville Iron Works Company,

which company furnished the boilers to defendant, exhibited certain blueprints and detailed dimensions of the proposed boilers to the representative of plaintiff company, and that the only objection plaintiff's representative made to the plans, was that "he would prefer a 52 inch corrugated furnace, or opening, in the boiler, instead of a 48 inch opening, because he believed that such an opening would produce better results." At this meeting, mechanical engineers representing each of the parties were present, and the record indicates that defendant was fully advised by its own engineers.

Davis was produced as a witness by the defendant, and with regard to the meeting in question, testified, in substance, that at this meeting a Scotch Marine Boiler of 350 horse power was discussed, and that a blueprint of the size and dimensions of a boiler which his company proposed to furnish to defendant was before the meeting; that the plan of the proposed boiler was designed for a 48 inch corrugated furnace, and that at the suggestion of plaintiff, a change was agreed to be made from a 48 inch to a 52 inch furnace. He also testified that there were 2178 square feet of heating surface of the boiler delivered to the defendant, and that "the rated horse power on a Scotch Marine type of boiler has been somewhat of an unknown quantity." On cross examination, this witness was asked whether or not, if he now were called upon to submit a bid for a 350 horse power boiler, he would suggest the boiler which his company furnished to defendant, and in reply stated that he would not. He also testified to the effect that on the basis of the rating of the boiler which defendant, by the terms of the contract agreed to install, the boiler furnished by the company represented by the witness to the defendant, would not comply with the provisions of this contract, and that if the capacity of a boiler should be based on 2-1/2 square feet of heating surface per horse power, the boilers

furnished because of this size, would not develop the amount of horse power provided by the contract. In other words, this witness whose company sold to defendant the boilers in question, admitted that they did not meet the specifications contained in the contract.

It seems not to be denied that plaintiff installed the heating plant, which it agreed to install for defendant, in strict accord with the specifications submitted in its original proposal and provided for in the contract. A number of opinion witnesses were produced by the defendant in an effort to demonstrate that if the heating plant had been efficient, the required horse power could be developed in the boilers installed. Plaintiff produced witnesses whose testimony was to the effect that the whole fault lay in the fact that the boilers installed by defendant were not 350 horse power boilers. However, the record indicates that after various efforts on the part of plaintiff to aid the situations, it became certain that the required power for defendant's plant, could not be produced. In the latter part of October, or the first part of November, 1933, and after it had been determined that with the equipment installed, the power plant would not operate efficiently, plaintiff employed one John A. Moore, a consulting engineer, to investigate the situation and to determine, if possible, what was wrong with the plant. After making a survey of the entire situation, Moore, together with representatives of both the plaintiff and defendant company, held a meeting. Moore testified that at this meeting, Keston, a representative of defendant company there present insisted that the trouble with the plant was with the oil burner, and that Keston was there asked whether or not he was aware of the fact that the boilers were not 350 horse power boilers, and that Keston then insisted that even if this were true, still in his opinion, the size of the boilers had nothing to do with the situation; that it was a defect in the oil burner which caused the failure, and that Lammert

of the plaintiff company then stated that "if you don't make this a 350 horse power boiler according to my contract, I will not guarantee to carry your load, but if you want to go along, we will do the best we can. We will be glad to do it, otherwise, we will have to step out." Moore further testified in substance, that in his opinion the entire trouble arose from the fact that the boilers were not of sufficient size and that, therefore, sufficient horse power could not be developed.

Roy F. Murphy, boiler inspector for the city of Chicago for twelve years, testified that he inspected the boiler in question and found it to be a Scotch Marine Boiler; that "we figure ordinarily that 10 square feet of heating surface equals a horse power, or an evaporation of 34-1/2 pounds of water, dry steam at 212 degrees Fahrenheit. The city uses those standards. The only boilers we inspect are in the City of Chicago. We use 10 square feet for any type of boiler, either water, fire box, or Scotch Marine. The specification on that boiler was 3178 square feet of heating surface. We have a formula that they use for arriving at horse power. The specification is furnished when they take out the permit to install the boiler. * * * We go through the boiler measure the thickness, diameter, length, amount and size of the tubes, observe the Morrison corrugated tube, take the size of the blow-off pipe, safety valves, see if the boiler is properly stamped, the size of the braces, the pitch of the rivets, all of that stuff is measured up. We do it in every case of a new installation. * * * The rated horse power on the boiler at the time of the inspection was 317."

From the entire record, we can come to no other conclusion than that the boilers set up by defendant, to which plaintiff's heating apparatus was attached, did not comply with the contract.

Also, we are of the opinion that from the entire evidence before him, the trial court was justified in concluding that the reason the oil burner installed could not produce the power required for defendant's purposes, was because of the size of the boilers which defendant installed.

In McKenzie Furnace Co. v. Mellers, 231 Ill. 561, a contract was entered into by which the furnace company agreed to install stokers under boilers of a certain horse power, and that the boilers to be installed were not then set in place. Under the terms of the contract between the parties, these stokers were to be erected under the boilers of 350 horse power, each of which was to be rated on the basis of 10 square feet of heating surface to one horse power, and 3,490 square feet of heating surface to each boiler. There, as here, the furnace company had nothing to do with the character of the boilers to be set up, or their construction. In that case it was shown that the boilers set up had a capacity of only 340 horse power and not 350 horse power, as provided in the contract, and the court said:

"The undisputed evidence is that the boiler with its baffling-tile was not set up when the contract was made, and the plaintiff did not enter into the contract in view of the manner in which the baffling-tile was put in. The stokers were being built before the boilers were finished. Aside from that fact, we cannot give to the contract a construction so unreasonable and contrary to the common understanding as the one contended for. It is true that the rated capacity of a boiler is an estimate, only, and that a boiler rated at 340 horse power may not develop exactly that power; but when the parties referred to a boiler of 340 horse power they certainly contemplated a boiler which was expected to develop that much power. The plaintiff was entitled to have the boiler in such condition that when fired without the stoker it would produce the horse power which a boiler so rated ordinarily produces. To construe the contract as requiring the plaintiff to develop 313 horse power with the boiler in such condition that it did not normally and would not produce anything like the horse power at which it was rated would be most harsh and unreasonable."

No question is raised as to the amount found to be due by the court. We cannot say that the finding is against the manifest weight of the evidence. The judgment is, therefore, affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39414

CITY OF CHICAGO,

Appellee,

v.

MYRON E. GILLENS,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

293 I.A. 322

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Municipal Court of Chicago, entered on December 24, 1936, assessing a fine against him for the sum of $25.00 for the violation of the following ordinance of the City of Chicago, the same being Section 2384 of the Revised Code of such city:

> "(Matter or Things Detrimental to Health) No building, vehicle, structure, receptacle, yard, lot, premises or part thereof, used or to be used for any purpose whatever shall be made, used, kept, maintained, or operated in the City if the use, keeping, maintaining, or operating of such building, vehicle, structure, receptacle, yard, lot or premises shall be the occasion of any nuisance or dangerous or detrimental to health."

Prior to the hearing and to the charge being made against the defendant, he operated a barbecue stand located at 4635 Clarendon Avenue, in the City of Chicago. The amended complaint upon which the hearing was had charges that between August 10th and August 21, 1936, complainant wilfully and unlawfully maintained the premises at 4635 Clarendon Avenue in the City of Chicago, in a manner dangerous and detrimental to the health of the public, causing a nuisance to exist, in violation of the ordinance referred to. Defendant moved to quash the complaint, which motion was denied.

Hilma A. Seagren testified that she is the owner of the premises at 4636 Clarendon Avenue, directly opposite the premises of the defendant, where she had lived about a year; that on August 10, 1936, she could not sleep because of the crashing of dishes and the blowing of automobile horns for service, in the serving of people on

the sidewalk outside of defendant's place of business; that people came in and out of the place between the hours of one and five in the morning, laughing and making loud noises.

Edward J. Zender testified to the effect that he resided at 4638 Clarendon Avenue, and that on the morning of August 31, 1938, he called the police to stop the noise from automobiles in front of the barbecue stand of the defendant, and that on that particular morning at 1:30, customers of the defendant made loud noises and permitted radios in automobiles to "keep going", and that the police ordered the customers of defendant to move.

Edna Green testified that at 2:45 in the morning of August 30, 1936, there was a great deal of noise coming from defendant's place of business; that her husband requested the customers of defendant to cease the noise and leave so that they could get some sleep, and that thereupon abusive language was used to her husband, and that the noise of laughing, throwing dishes around and playing the radio continued until 4 o'clock in the morning of that date. Other witnesses testified to the same effect.

Among these witnesses was Captain Patrick B. O'Connel, captain of police of the City of Chicago, who testified that every night from August 11th to August 36th, of the year mentioned, customers of defendant indulged in tooting of horns and loud talking and singing, which disturbed the peace of the neighborhood.

There seems to be no question of fact involved in the case. At the close of the complainant's case, defendant made a motion to dismiss upon the ground that the ordinance in question was invalid, because of the fact that it is uncertain, vague and incomplete, that it delegates unrestricted authority to administrative officers of the City of Chicago, and is, therefore, void. This motion was also denied.

In City of Chicago v. Atwood, 369 Ill. 624, an ordinance of the City of Chicago was attacked upon substantially the same grounds as are urged here against the ordinance in question. In that case, the ordinance attacked was as follows:

> "Prohibited closets - Removal. Pan, plunger, offset, washout-range closets and wash-out latrines shall not be allowed in any building, nor shall hopper-closets be installed in any building hereafter erected. Such closets, when found to be a nuisance, shall be removed, or when the same are removed for repairs they shall not be again installed."

In that case, it was contended that the ordinance was indefinite and, therefore, invalid, because it did not ordain who should remove the closets, or who should find the closets to be a nuisance, and did not define the physical conditions which should constitute the closets a nuisance, and the court said:

> "The language, 'such closets, when found to be a nuisance, shall be removed,' etc., does not require a judicial or official finding. The words 'found to be a nuisance,' mean found, discovered or perceived to be a nuisance by anyone affected by the nuisance. It is not necessary that the ordinance should define the physical condition which shall constitute a nuisance. '<u>Whatever is offensive, physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance.</u>' (<u>Mahle</u> v. <u>Reinbach</u>, 76 Ill. 338; <u>Cohler</u> v. <u>Levy</u>, 234 id. 535.) The existence of such offensive condition was essential to the recovery and the burden of proving is rested upon the city. The person who shall remove the closet when found to be a nuisance is necessarily the person who allows it in the building and has authority to remove it. It is by his sufferance that the nuisance is created and maintained and it is he who is subject to the penalty of the ordinance." (Italics ours)

See also <u>People</u> v. <u>Hula</u>, 355 Ill. 412; <u>Block</u> v. <u>City of Chicago</u>, 239 Ill. 251.

We are of the opinion that the ordinance is sufficiently definite, and that from the evidence adduced, the court was justified in its finding. The judgment of the Municipal Court of Chicago is, therefore, affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39467

MORTON KALLIS, Plaintiff below,
Appellee,

v.

UNIVERSAL GUIDE CORPORATION, a corporation, Defendant below,

SOL D. COLBY and JOHN A. VOGELSANG, Intervening Petitioners,
Appellants.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY.

293 I.A. 222

MR. JUSTICE HALE delivered the opinion of the court.

On December 4, 1936, a creditor's bill was filed by Morton Kallis against the Universal Guide Corporation, a corporation. The bill charged that the defendant was indebted to the plaintiff in the sum of the amount of the judgment entered, as noted hereafter, that plaintiff had made demand upon the corporation and that the corporation refused to pay the debt, that defendant is insolvent, that plaintiff had no remedy at law. The prayer of the bill was that a decree and judgment be entered for the sum alleged to be due, that a receiver be appointed and that a sale of the property of the defendant be made. On December 8, 1936, the court entered an order appointing a receiver, and a bond for $1,000.00 was posted. The receiver's bond for that amount was approved on January 9, 1937. An answer was filed by the defendant corporation, signed by one Genevieve Ebert, secretary, which admitted the liability, but denied the insolvency.

On January 9, 1937, a decree was entered in the cause in which it was found that $73,738.81 was due from the defendant corporation to plaintiff; that the assets of the plaintiff were wholly insufficient to pay the amount; that the defendant corporation is wholly insolvent; that the plaintiff had a prior lien on all the assets; that judgment be entered for the amount mentioned; that

execution issue forthwith; that the defendant pay the judgment within three days of the entry of the order; that the receiver theretofore appointed sell the assets of the corporation at 10:00 a. m. on January 13, 1937, and that plaintiff have the right to become a purchaser at the sale. On January 14, 1937, the property was sold to plaintiff for $8,000.00, and on January 18, 1937, an order was entered confirming the sale and finding a deficiency over and above the amount of $8,000.00 to be due to the plaintiff. On January 27, 1937, an order was entered discharging the receiver.

Prior to the entry of the decree, and on December 11, 1936, notice was served on Sol D. Golby and John W. Vogelsang, stockholders of the corporation, of the pendency of the suit. On December 18, 1936, leave was given to Golby and Vogelsang to file answers and cross bills. On December 24, 1936, Golby and Vogelsang each filed a petition. In the Golby petition it was alleged that the petitioner was the owner of 200 shares of the common stock of the defendant corporation; that plaintiff was the president and had control and had operated the business of the defendant corporation and managed its affairs without consent or knowledge of the petitioner; that no meetings of the stockholders had been held for three years; that petitioner had never been notified of the financial condition of the corporation and had no knowledge of any sums that were due the plaintiff; that he did not know of the action taken until December 11, 1936; that he did not authorize the filing of the appearance of defendant corporation, nor the answer admitting the liability of the corporation to the plaintiff; that no stockholders' meeting had been called to advise the petitioner and other stockholders that the corporation was insolvent; that no account had been had of the corporation for three years last past; that a certain publication which was the largest of the assets of the defendant corporation, had a value of $25,000.00 and a good will worth

$50,000.00, and that the receiver appointed was not a fit or proper person to carry on the business of the defendant. The prayer of this petition was that the books of the defendant corporation be delivered to the court, and that petitioner be permitted to examine same, that the petition stand as a cross bill, and that petitioner have such other and further relief as may seem meet. Vogelsang's petition recited that he was the owner of 300 shares of stock of the defendant corporation; that Gallis was the president of the corporation; that petitioner had received no notice of the meetings, nor that he had waived any such notice; that the first notice he had of the pendency of this proceeding was when he was apprised that the assets were about to be sold; that the appearance of the corporation defendant in the proceeding was by an attorney employed by plaintiff for the ostensible purpose of permitting a decree to be entered, admitting the indebtedness of the corporation; that the defendant corporation is the owner of a freight guide with a circulation of 5,000; that it receives $8.00 for each subscription; that the corporation receives approximately $15,000.00 for advertising; that the plaintiff permitted his claim against the corporation to become fraudulently enhanced, solely for the purpose of obtaining a hold and unfair advantage of the defendant corporation, and that it was the duty of the plaintiff as an officer, to honestly and diligently administer the affairs of the corporation, which he had not done. It denies that the defendant corporation is indebted to the plaintiff in the sum of $73,000.00 and upwards mentioned, and alleges that the financial condition of the defendant corporation was due to the collusion between the plaintiff and the persons who he permitted to carry on the business of the defendant. The prayer of the petition was that the petitioner be allowed to file his appearance and cross bill, and that the receiver be removed. On December 24, 1936, leave

was given to both these petitioners to file their petitions. As to the petition of Sol J. Colby, Universal Wide Corporation, filed by Morris J. Klank, by answer, states that it neither admits nor denies the allegations contained in the petition, and demands strict proof thereof. As to the petition of John V. Vogelsang, Universal Wide Corporation, by answer presented by Morris J. Klank, its attorney, denies the allegations in the petition and states that the books and records of the corporation show that there is due the plaintiff the amount set forth in the complaint.

The cause was set for a hearing on December 29, 1936, but because of the illness of the judge to whom the case was assigned, the case was continued until January 8, 1937. On the last mentioned date, counsel for the intervening petitioners appeared in court and stated to the court that the two intervening petitioners had not had an opportunity to examine the books of the corporation to find out whether or not the facts as set forth in the complainant's bill were true, and asked for a postponement of the hearing in order that they might make such search. Their request was denied by the court, and the court proceeded with the hearing.

Genevieve Ebert, a witness for the plaintiff, testified that she was the bookkeeper for the Universal Wide Corporation, and that she kept all the books and accounts of all transactions of the defendant corporation. She was asked to state the names of the creditors of the Universal Wide Corporation, and in reply stated: "There is, November 30, 1936, M. Kallis & Company;" that the Kallis Company was the main creditor, and that the corporation was indebted to this institution in the sum of almost $63,000.00; that as of July 31, 1934, the records of the corporation showed a loss of $13,646.45; that as of July 31, 1935, the books showed a loss of $14,337.41; that as of July 31, 1936, the books showed a loss of $18,768.12; that the plaintiff,

Morton Kallis, never drew any money out of the corporation; that the witness had been with the defendant corporation ever since it was organized; that on December 4, 1936, the corporation was unable to pay its indebtedness to Mr. Kallis. She was asked this question: "To your knowledge, is that debt, - that debt is a fair and reasonable debt due and owing to Mr. Kallis from the corporation?" To this question, this witness answered "Yes." She also testified that she received no salary from the corporation; that she kept books for M. Kallis & Company. Her testimony is further to the effect that most of the indebtedness of the defendant corporation was for printing done by M. Kallis & Company. In explaining her answer that no money had been paid to Mr. Kallis, she said that what she meant was that no money was paid to him in person. She further explained that money was deposited in the name of M. Kallis & Company, and that from August, 1935, to February, 1936, there were nine payments made to this company for printing during that time, a total of $7,[illegible]7.63; that the corporation in 1935, took in $26,556.72 and in 1936, $29,762.26; that commissions paid to 35 men from July 1, 1935, to July 1, 1936, amounted to $11,865.41. She also testified that from July, 1935 to December, 1936, office salaries and other expenses amounted to $10,005.00. All of this testimony was objected to, the attorneys for the intervening petitioners insisting that the matter should be referred to a Master in Chancery so that proper evidence might be adduced as to the exact financial standing of the corporation, and that a continuance of the matter be had in order that a thorough examination of the books might be made. Attorneys representing the intervening petitioners also objected to the testimony offered by this witness as to the contents of the books and the financial condition of the corporation. The objections were overruled, and the court proceeded and entered the orders hereinbefore noted. The appeal here is from all of these orders.

In City of Chicago v. Cameron, et al., 120 Ill. 447, a controversy arose between the stockholders and the officers of a corporation. The stockholders had filed a bill against certain officers of the corporation, asking that certain conveyances be set aside and an accounting be had. It was insisted that the stockholders could not maintain the action, that the suit should have been brought on behalf of the corporation, and in passing upon that question, the Supreme Court, quoting Pomeroy on Equity Jurisprudence, said:

> "Wherever a cause of action exists, primarily in behalf of the corporation, against directors, officers and others, for wrongfully dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation, either actually or virtually, refuses to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrongdoing directors, officers and other persons."

See also Butler Paper Co. et al. v. Hobbins, et al., 151 Ill. 588.

We are of the opinion that these intervening petitioners, holders of a considerable amount of the capital stock of this corporation, were entitled to a hearing, and that the drastic action of the court in entering the decrees and orders here was not justified. The testimony of the witness, Genevieve Ebert, was secondary, and should not have been admitted. The books of the corporation are the best evidence as to the company's affairs. The judgment entered by the court in favor of the complainant, the order of the court directing the sale of the property, and the order approving the sale, are reversed and the cause is remanded for a further hearing on the merits.

REVERSED AND REMANDED FOR A HEARING.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

73574

SAMUEL [illegible], doing business as
[illegible] VALVE COMPANY,

(Plaintiff) [illegible],

v.

JAMES [illegible] & SONS, [illegible] CORPORATION,

(Defendant) [illegible].

293 I.A. 623

Mr. JU[illegible]

Plaintiff Samuel Warsten, doing business as Sky Valve Company, brought an action against James G. Blow & Sons, a corporation, to recover damages for an alleged breach of a written contract for the sale of certain wash sink faucets. A trial was had before the court without a jury, resulting in a finding in favor of plaintiff and judgment was entered for $1476.00 against the defendant, from which judgment defendant brings this appeal.

In his complaint plaintiff alleged the receipt of an order from the defendant dated May 1, 1931, for 484 wash sink faucets at $4.75 each, delivery to be made October 1, 1931, and sooner if instructed; that he accepted the order and caused the faucets to be manufactured, and was ready, able and willing to make delivery of the faucets to the defendant in accordance with the terms of the order; that defendant refused to direct shipment by plaintiff or to accept or receive the faucets.

Defendant's answer denied each and every of the above allegations and further averred that the proposal it sent to plaintiff on May 1, 1931, was accompanied by a letter which became part thereof by reference, and constituted merely a proposal or offer to purchase on the terms therein mentioned; that plaintiff at no time confirmed, in writing or otherwise, the acceptance of the offer upon the terms proposed and that said offer was, on June 15, 1931, withdrawn by defendant.

Plaintiff's theory is that a valid contractual relationship

was created by the original order, the defendant's shipping order, the plaintiff's request for more specific shipping instructions, and that by their conduct both parties recognized the existence of a valid contract. Further, the only reasons ever given by the defendant, prior to litigation, for its refusal to accept the goods were (a) that the work had been stopped on the home job for lack of funds, and (b) that it would not use plaintiff's valves on defendant's sinks and that defendant's present contentions as to the technical invalidity of the contract constitute a shift of position.

Defendant's theory is that the proposal, by its terms, as a condition precedent to its acceptance, required a reciprocal promise in writing on the part of the plaintiff, namely, that the faucets be subject to acceptance by the school board; that defendant may return unusued faucets; that the intention of the plaintiff to be so bound was never communicated in writing or otherwise to defendant.

2. The plaintiff was not legally bound to perform, hence the alleged contract was lacking in mutuality.

3. The plaintiff's agent's telephone communication to defendant asking for more specific shipping directions did not constitute an unconditional or authorized acceptance of the defendant's proposal.

4. The offer of the defendant was withdrawn.

The evidence for plaintiff tends to show the following:

On May 12, 1931, plaintiff received the following order from the defendant:

"JAMES B. CLOW & SONS
201-209 North Talman Avenue
Chicago

No. 30152
Chicago, 5-12-31.

To: Sakay Valve Company
206 S. Jefferson St.
Chicago, Illinois

Ship: US
Delivery Will be wanted October 1, 1931, Not Sooner Unless Instructed.
484-askay V-105-L Polished crodon plated compression double wash sink faucets with spray heads, indexed metal side lever handles, 3/4" male tailpiece with concealed volume reducers, 3" center to center, and with removable seats, Faucets must have manufacturer's name stamped on.

HWL:WO Price $4.75, each net."

Accompanying this order from defendant, there was a letter which reads as follows:

"James B. Olow & Sons
201-299 N. Talman avenue
Chicago.

Our Order #44 Chicago,
May 1?, 1931

Askay Valve Company
308 S. Jefferson St.,
Chicago, Illinois.

Gentlemen:-
I am attaching our order 0152 covering the wash sink faucets for the Lane High School. In placing this order with you we understand that these faucets are acceptable to the Board of Education. If for any reason these faucets are not acceptable or if any are left over on the job, we are to be permitted to return them to you at the price we paid for them without any deduction for handling charges. If you are satisfied with the above conditions in regard to this order, kindly confirm your acceptance of them in writing.
With very best regards,
Yours very truly,
James B. Olow & Sons
R. C. Flinder
City Sales Manager."

Mr. R.C. Flinder-m

No confirmation of this order in writing was ever sent by the plaintiff to the defendant James B. Olow & Sons.

On June 3, 1931, defendant wrote a letter to the Askay Valve Co., as follows:

"James B. Olow & Sons
Chicago
June 3, 1931

201-299 N. Talman avenue
Chicago
Askay Valve Co.,
308 South Jefferson Str.,
Chicago, Illinois

Gentlemen:
Please arrange for immediately delivery of 243 faucets on order 30152. The balance are to be held for the present and delivery made when we give you future instructions. Let us

know when we may expect the 243.

Yours very truly,
James B. Clow & Sons
(Signed) H. W. Lehman
Purchasing Agent"

Dictated by
H. W. Lehman

No acknowledgment of the order or answer to this letter was made by plaintiff and on June 16, 1931, defendant again wrote to Eskay Valve Co., as follows:

"JAMES B. CLOW & SONS
301-399 N. Talman Avenue
Chicago

Chicago Windak
June 16, 1931.

Eskay Valve Company
308 S. Jefferson St.,
Chicago, Illinois.

Gentlemen: -

Please be instructed to hold up all, or any undelivered portion of our order No. 20153. This material is for the Lane Technical High School of this city and all work is stopped because of lack of funds to carry on. Nothing further is to be done on this order until further advised.

Please acknowledge.

Dictated by
H.W. Lehman
o

Very truly yours,
James B. Clow & Sons.
(Signed) H. W. Lehman
Purchasing Agent."

Plaintiff made no reply to the above communication in writing.

Plaintiff further supported his contention by introducing one Windak, the stockman in charge of their shipping, who testified that he had received the order from the plaintiff concerning the sink faucets; that in January 1931 plaintiffs had 641 valves; that during the month of May, 1931, they had about 600 of these valves; that he started to assemble the 243 valves, after the order of June 3, 1931, because the bodies came separate.

The witness Windak further testifying stated that he talked to the purchasing agent about June 6th or 7th, 1931, and asked him for delivery instructions, but that he was told there were none at that time, but to "Just hold it up. I will call you and give you your shipping instructions."

The purchasing agent for the defendant James B. Clow & Sons denied knowing Windak and also denies this conversation.

Samuel Kersten, called as a witness in his own behalf, testified that he is a manufacturer of brass valves and familiar with the Saskay Valves involved in this suit; that he received defendant's order and that he made up a shop order and turned it over to Mindak to prepare for filling the order for delivery; that he had 484 valves on hand at the time; that when he received defendant's letter of June 15, 1931 (plaintiff's exhibit 4) he instructed Mindak, the man in charge of the stock, to hold up the order for the present and to get information for future delivery; that along about March or April, 1934, he had a conversation in the office of Mr. Clow at their plant on Lake street; that he told Mr. Clow that he had an order for 484 valves for the Lane School and wanted to know what he was going to do about delivery; that Clow said, "Well, we are not going to use your valves. We cannot use Saskay valves on Clow fixtures and we have no intentions of using your valves on the Lane School on our wash sinks".

Further testifying Kersten stated that he made threats about the acceptance and receiving of the valves; that he advised Clow that the valves were manufactured and they would have to take them off his hands; that in 1934 he called in a party by the name of Keplan from the Republic Plumbing Supply Co. and sold and delivered the valves to that company for $1.70 each; that he investigated with reference to the work done at The Lane Technical School after the plumbing had been completed and found that the valves installed were not "Saskay" valves but were Clow valves and that there were about 85 wash sinks installed there.

Harry W. Lehman, called as a witness on behalf of defendant testified that he is associated with James W. Clow & Sons, as purchasing agent; that he does not know anyone connected with Samuel Kersten doing business as Saskay Valve Company by the name of Mindak (the shipping clerk of plaintiff) and that he was positive that at no

time did the latter call him during 1931.

W. G. Spillane, called as a witness on behalf of defendant, testified that he is the manager of the plumbing and heating department of James B. Clow & Sons and has been so engaged for the past 35 years; that he did not at any time have any conversation with Mr. Kersten with reference to these valves; that the valves described in plaintiff's exhibit 1 is a combination fixture or faucet to permit the entry of hot and cold water and mixing into a central spout and it is generally used in industrial work; that the law requires a combination of the faucets to mix the water, and the men wash under a combined mixture of the water, if they so desire, and there is a spray head on it; that there was very little demand for industrial work during the depression of 1929, to almost the present day.

The witness Spillane further testified, when asked to describe the difference, if any, between valves, that when the valves were purchased by the Michigan Smelting and Refining, the handles were omitted, that being a common practice; that the only thing necessary to make these valves complete is simply the assembly of a handle, one person might want a china handle and another a metal handle; that that was the only difference in assembling the valves.

Other witnesses introduced on behalf of the defendant denied in substance all of the claims of the plaintiff.

We are not impressed with the claim of the plaintiff. He received a conditional order from the defendant in May 1931, for delivery October 1, 1931, and not sooner unless so advised, for 484 sink faucets. Accompanying said order was a letter dated May 13, 1931, providing that the "faucets are acceptable to the Board of Education" and if for any reason these faucets are not acceptable or if any are left over on the job, they were to be permitted to return them to plaintiff at the price defendant was paying for them without any deduction for handling charges. They asked defendant if satisfied

with the conditions with regard to the order to kindly confirm its acceptance in writing. No confirmation in writing or otherwise was given.

An attempt was made by plaintiff, through the testimony of the witness Mindak, to show that an oral order had been given by defendant for the shipment, but this was promptly denied.

No attempt was made by the plaintiff to show that these valves were satisfactory to the Board of Education, which was one of the controlling conditions of the original order. The evidence does not support the contention of any loss on the part of plaintiff because the defendant intended to give them notice when they were prepared to use some of them, if possible, but it was a deferred order in the sense that they had not obligated themselves to accept any particular number of valves.

The finding and judgment of the trial court is clearly against the manifest weight of the evidence and should not have been entered. In that respect the trial judge committed error.

For the reasons herein given the judgment of the Superior Court is reversed.

JUDGMENT REVERSED.

HEBEL, P.J. AND HALL, J. CONCUR.

38933

STELLA MITCHELL,
Appellant,

v.

WILLIAM A. WYRZKOWSKI et al.,
Defendants.

THE CICERO TRUST & SAVINGS BANK, individually and as trustee; CHARLES H. ALBERS (substituted as defendant in lieu of William H. O'Connell, deceased), as receiver of the Cicero Trust & Savings Bank,
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

293 I.A. 323

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Stella Mitchell, plaintiff, appeals from an order of the superior court approving a report of sale in a foreclosure proceeding wherein she sought to hold the Cicero Trust & Savings Bank, as trustee, one of the defendants herein, liable upon the deficiency after sale because of alleged misrepresentations of the officers of the bank at the time the mortgage and trust deed were purchased from the bank and also because of the alleged misapplication of insurance money which plaintiff charges the trustee with having received after a fire loss. When the bank was placed in liquidation William L. O'Connell, as receiver, was made a party defendant, and upon the death of O'Connell, during the pendency of this appeal, Charles H. Albers was substituted as defendant in lieu of O'Connell.

It appears that August 8, 1924, Edith R. Bolig and Frank Bolig, her husband, executed a promissory note for $1,200,

due three years after date, secured by trust deed on the premises here in question. Defendant Cicero Trust & Savings Bank was designated as trustee. August 8, 1930, the indebtedness being unpaid, the Boligs quitclaimed the premises to one William A. Wyrzykowski, who signed an agreement whereby payment of the indebtedness was extended three years.

Stella Mitchell, plaintiff, carried a savings account in defendant bank, and, in November, 1927, she decided to buy a mortgage with her savings. According to her testimony she talked with Mr. Sobotka, the cashier, who handled the bank's securities, and requested him to look up some good mortgages. He agreed to do so and asked her to return in a few days. Upon her return Sobotka said that he had a good mortgage for sale, and upon inquiry by her as to whether the taxes were paid he replied that "everything was in fine shape." This evidence was denied by Sobotka. Plaintiff obtained the address of the premises, inspected them, talked to the mortgagors, and then, returning to the bank, purchased the mortgage for $1,226.10, which was taken out of her savings account and a receipt given her. Although there were defaults in certain special assessments at the time of the purchase, plaintiff testified that she had not been apprised thereof by the bank, and did not learn, until shortly before the foreclosure proceeding was filed in June, 1931, that there were any arrears in the payment of taxes or special assessments; she relied entirely upon the statement of the bank official. When the purchase of the securities was made plaintiff received the promissory note and trust deed. Thereafter the bank continued to handle the interest coupons and collect payments, and semiannually it paid the proceeds of the interest money to plaintiff.

When the mortgage became due in 1930 Sobotka asked plaintiff whether she desired to renew the mortgage, and she testified that she then inquired of him whether the mortgagors had been paying their

bills and whether "everything was all right;" that Sobotka assured her that "everything was fine." She also inquired whether there were any liens on the premises, or any unpaid taxes, and Sobotka assured her that "everything was in first class condition and that she could take his word for it." She thereupon consented to renew the mortgage, and a few days later an extension agreement was executed.

It appears from the evidence of Sobotka, who sold the mortgage to plaintiff, that the bank for many years had its representative make an examination as to taxes and special assessments on its trust deeds, in order that it might be apprised of any delinquencies; that these examinations were made annually, at appropriate times, and that plaintiff was not told that there were any arrears on the property at the time the mortgage was sold to her or thereafter.

Wyrzykowski, the grantee of the property, failed to pay certain interest charges and special assessments, and by reason of these defaults plaintiff filed her bill on July 3, 1931. A decree of foreclosure was entered pursuant to a hearing before a special master to whom the cause had been referred generally, finding the sum of $2,811.23 due plaintiff. A sale was had pursuant to the entry of the decree, and the property was bid in by plaintiff for the sum of $1,000, leaving a deficiency of $1,891.18, with interest from February 19, 1936. A deficiency decree was duly entered and the court found, inter alia, that there were delinquencies in the payment of special assessments and taxes aggregating $105.85; that the bank, individually and as trustee, failed to inform plaintiff at any time that taxes and special assessments were delinquent or forfeited; that the bank made a search each year of the tax records on parcels of real estate secured by trust deeds wherein the bank was trustee; and that by reason of the knowledge thus obtained the bank was under a duty to inform plaintiff as to the delinquencies in taxes and special assessments and because of its failure as

trustee to so notify and advise plaintiff, the bank became liable to her in the sum of $105.85, being the amount of the unpaid taxes and special assessments in default and delinquent at the time the note and trust deed were purchased from the bank.

Under the provisions of the trust deed the owner of the equity was required to keep the building insured, and to deposit the policy with the trustee as additional security. A standard fire insurance policy issued in accordance with this provision, carrying the usual mortgage clause and giving the insurance company, in case of fire, the option to rebuild or replace the property lost or damaged. At the time the bank delivered to plaintiff the mortgage note for $1,200 and interest coupons and the trust deed securing it, the fire insurance policy was also delivered to her and she kept it in her possession along with the note and trust deed. In February, 1928, a fire damage was sustained on the property covered by the mortgage. One Jablowski, who was purchasing the premises from the Boligs under a contract, employed Henry Otterson, a contractor, to repair the damage. Negotiations were made through George Kutina, Otterson's agent. The contract price was fixed at $954.65. When the improvements on the damaged property were completed, the insurance company issued its draft under date of April 2, 1928, in the aforementioned sum, payable to the order of Edith Bolig, the mortgagor, the bank, described as the mortgagee, Alex Jablowski, the contract purchaser, and George Kutina, the contractor's agent. All these parties were made payees on the draft because they had or purported to have, some interest in the property, either as mortgagors, mortgagees, purchasers or under the lien statute. With the indorsements of Mrs. Bolig, the bank and Jablowski, the draft was delivered to the contractor May 7, 1928, at which time he released a mechanic's lien on the premises, theretofore filed. This

was about two weeks after the completion of the work. Subsequently Kutina also indorsed the draft, and with his own added Otterson deposited it to his account in the Second Northwestern Bank, through which it cleared and was paid in due course. No part of the proceeds of the draft was received by the Cicero Trust & Savings Bank or by any person other than the contractor who repaired the premises after the fire.

Plaintiff predicates her appeal upon the refusal of the chancellor to include in the decree a finding that the Cicero Trust & Savings Bank as trustee is personally liable to her upon the entire deficiency of $1,891.18, (1) because of the alleged misrepresentations of the bank as to delinquent taxes at the time the securities were purchased, and (2) because the chancellor held that the insurance money was properly paid to the contractor who made the repairs, instead of plaintiff, under the provisions of the policy giving the insurer the option to rebuild or replace the damaged property.

Taking first the item of $954.65, proceeds of the fire loss paid by the insurance company to Otterson, we find that in accordance with the requirements of the trust deed the fire insurance policy insured the mortgagor and carried the usual mortgage clause. Any claim that plaintiff may have against the bank is necessarily governed by the provisions of the trust deed and the policy of insurance. Although the policy insured Edith Bolig against loss or damage, and provided that such loss, if any, should be payable to the mortgagee, it also provided that it should be optional with the insurance company to rebuild or replace the property lost or destroyed. Obviously, the rights of all the parties under the policy, including plaintiff, were subject to this paramount right of the insurance company to exercise its option. If it elected to restore the property to its former condition, both plaintiff and the

bank were required to abide by its election, for the law is generally to the effect that the insurer may, under an option clause such as existed in this policy, rebuild the property in lieu of paying the fire loss. (Aetna Insurance Co. v. Phelps, 27 Ill. 71; State Bank of Chilton v. Citizens Mutual Fire Ins. Co., 252 N. W. [Wis.] 164, 214 Wis. 6; Commonwealth Ins. Co. v. Sennett, Barr & Co., 37 Pa. 205.)

Plaintiff takes the position, however, that the insurer did not exercise its option and was not instrumental in having the premises restored, but that the repairs were made by direction of Jablowski, the contract purchaser, with the consent of the bank and independently of the insurer and without the consent or knowledge of plaintiff. However, the record does not sustain this contention. Plaintiff was evidently aware of the handling of the fire loss, because the policy had been in her possession since the purchase of the mortgage in 1927, prior to the fire, and when it was produced by her at the hearing before the special commissioner it bore upon its face the following legend: "This policy is hereby reduced $954.65, for loss of February 25, 1928." This indicated knowledge and acquiescence on her part to the exercise of its option by the insurer.

Plaintiff's counsel argues that "when the proceeds of the insurance loss came into the hands of the bank, it had no authority to pay them to others than plaintiff for any purpose without plaintiff's express consent, and is now liable for the wrongful diversion of the proceeds." A sufficient answer to this contention is that the bank did not receive any of the proceeds of the policy, nor did it direct that the proceeds be paid to Otterson instead of plaintiff. The payment to Otterson resulted from the option exercised by the insurer and not through any direction or order of the bank.

Plaintiff cites the case of Koscher v. Chicago City Bank &

Trust Co., 280 Ill. App. 500, recently decided by this branch of the appellate court, as controlling. In that case the owner of the equity engaged one Lobstein, a building contractor, to repair the damage to the building caused by the fire, and she agreed to pay him a stipulated sum. The work was done by Lobstein without the knowledge or consent of the trustee or the owner of the mortgage. The sole question presented on appeal related to the distribution of the proceeds of the draft made by the insurer and, under the circumstances of that case we held that under the provisions of the trust deed the money then in the hands of the master belonged to the mortgagee. There is nothing in the Koscher case to indicate that the insurance company had reserved in the policy an option to repair the property in lieu of paying the proceeds to the parties in interest, and no claim was there made that any attempt had been made by the insurance company to exercise the option, if one existed. Under all the circumstances it would be unconscionable to hold in the case at bar that after full restoration of the mortgaged premises the receiver of the closed bank should be charged with the sum paid by the insurance company to Otterson for restoration of plaintiff's security. We are constrained to hold, as the court did in Ramsdell v. Insurance Co. of N. A., 197 Wis. 136, at p. 139, that "the court looks to the substance of the whole transaction rather than to seek a metaphysical hypothesis upon which to justify a loss that is no loss."

Plaintiff's remaining contention that the bank is liable upon the deficiency for the amount of all tax forfeitures prior to the date of the bank's failure is predicated upon the theory of a fiduciary relationship between plaintiff and the bank. Plaintiff's complaint charges the bank with actual fraudulent misrepresentations as to the status of taxes, but the court made no finding of fraud; the chancellor merely found by the decree that the bank failed to inform plaintiff that certain taxes and special assessments were delinquent.

It is argued by defendants that plaintiff shifted her position and instead of proceeding under the allegations of fraud, tried her case upon the theory of a fiduciary relationship, without amending her pleadings. Without entering into an extended discussion of this point we feel that the chancellor was justified in finding that the bank failed to inform plaintiff of the delinquency in certain taxes and special assessments when the mortgage was purchased, and in thus holding the bank liable to the extent of $105.85 for withholding this information. However, there is no basis for the contention that the bank owed a continuing duty to plaintiff to keep her advised as to payment or nonpayment of taxes after purchase of the mortgage until payment of the mortgage indebtedness. She was a depositor at the bank and voluntarily solicited information as to the purchase of a good mortgage. This of itself does not constitute such a fiduciary relationship as would impose upon the bank the duty to keep her constantly advised as to the status of tax payments.

At the conclusion of plaintiff's brief her counsel says:

> "It is not necessary to enter into a computation of *** the amount necessary to redeem from tax forfeitures which had accrued when plaintiff was informed thereof by the bank's president in June, 1931. The plain breaches of duty by the bank in the several matters appearing from the testimony requires that the bank be held liable under the Trust Companies Act for the amount of the deficiency. We therefore ask that *** the bank be found liable as trustee to the extent of the deficiency and that the receiver *** be charged therewith pro rata with other creditors ***."

Such a conclusion cannot well be predicated upon the circumstances of this case. Plaintiff was the purchaser at the master's sale, having bid the property in for $1,000. She thus became entitled to a deficiency decree against Edith R. Bolig, the maker of the notes, who was personally served with summons. Plaintiff has collected the rents from the property since April, 1931. She had inspected the mortgaged premises before she purchased the securities, had interviewed Edith R. Bolig before the purchase, and had an opportunity to ascertain her

financial responsibility, and the fire damage had been completely repaired without any expense to her. She now seeks to hold the closed bank liable for the amount which the insurance company paid for restoration of the property, for taxes which the mortgagor should have paid, as well as the deficiency at the master's sale. The court sustained her contention that she was entitled to the delinquencies in taxes up to the time she purchased the securities, and we think that is all she was entitled to receive.

During the pendency of this appeal the receiver by motion sought to have the superior court satisfy the decree against the bank for $105.85, upon the theory that plaintiff had collected rents in excess of that amount which he says were used to pay the taxes and special assessments upon which the decree of $105.85 was based. Plaintiff thereupon moved for leave to file a petition for a writ of prohibition restraining the superior court from assuming and exercising jurisdiction in the cause during the pendency of this appeal and until it had been determined. That motion was denied. Subsequently plaintiff filed another motion to vacate the order denying her petition for a writ of prohibition, and that motion was taken under advisement. In now denying this motion we feel constrained to say that plaintiff was rightfully in possession and was entitled to the rents, issues and profits under the trust deed after default, and we see no reason why the net rentals should be credited on the judgment against the bank.

For the reasons stated the decree of the superior court should be affirmed, and it is so ordered.

DECREE AFFIRMED.

Scanlan and Sullivan, JJ., concur.

39728

A. W. FROEHDE,
Appellant,

v.

GEORGE HOPFNER, ROSE HOPFNER and CHARLES W. LANGGUTH,
Defendants.

BELMONT REALTY COMPANY, a corporation, (garnishee),
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

293 I.A. 223

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Pursuant to the entry of a judgment in favor of A. W. Froehde, plaintiff herein, against George and Rose Hopfner and Charles W. Langguth, defendants, plaintiff brought garnishment proceedings against Belmont Realty Company, a corporation, garnishee. The cause was tried by the court without a jury, resulting in the discharge of the garnishee, and this appeal followed.

The cause was heard upon the following agreed statements of fact:

"1. On or about August 4, 1925, Charles W. Langguth, George Hopfner and Rose Hopfner, the defendants herein, conveyed the premises in question to Continental and Commercial Trust and Savings Bank, as Trustee under Trust Agreement No. 6450, of which they were the beneficiaries.

"2. On or about August 3, 1927, Continental and Commercial Trust and Savings Bank, as Trustee under Trust No. 6450, executed and delivered its Trust Deed to Lake View Trust and Savings Bank, as Trustee, conveying the premises in question to secure the payment of the notes of Charles W. Langguth, George Hopfner and Rose Hopfner, defendants herein, aggregating One Hundred Twenty Five Thousand Dollars ($125,000.00).

"Said Trust Deed provided as follows with reference to the

rents, issues and profits of said premises:

"Conveys and warrants to Lake View Trust and Savings Bank, a corporation, as Trustee, in trust nevertheless--

"'*** together with all rents, issues and profits, which shall hereafter accrue from said premises, which rents, issues and profits are hereby conveyed and assigned to said party of the second part, and its successor in trust, hereby releasing and waiving all rights, under and by virtue of the Homestead Exemption Laws of the State of Illinois.'

"3. On or about July 24, 1934, the said mortgage being in default, the Continental Illinois National Bank and Trust Company under Trust 23468 as successor to Continental and Commercial Trust and Savings Bank as Trustee under Trust 6450, made its assignment of rents of the premises involved to the Belmont Realty Company, a corporation, garnishee herein; the said Belmont Realty Company, a corporation, being affiliated with the Lake View Trust and Savings Bank, a corporation, Trustee named in said Mortgage Trust Deed.

"4. That from the last said date to the present time, the said Belmont Realty Company has operated said building, collected all rents and made necessary disbursements for maintenance and taxes.

"5. On or about April 8, 1936, Continental Illinois National Bank and Trust Company under Trust 23468 as successor to Continental and Commercial Trust and Savings Bank as Trustee under Trust 6450, conveyed the premises to Oliver W. Cox, nominee of Lake View Trust and Savings Bank, as Trustee in connection with proposal for liquidation trust, which proposed trust was not consummated.

"6. No foreclosure proceedings have been had under said Trust Deed and no receiver has been appointed."

Plaintiff is the owner and holder of one of the mortgage notes secured by the $125,000 indebtedness, and had judgment May 8, 1936, against defendants in the sum of $2,983.06. Execution issued, was served on defendants and returned by the bailiff "no property found." Thereafter garnishment proceedings were instituted and the garnishee answered "no funds". Plaintiff filed a reply to the answer, contesting same. Records of the garnishee show that on the date of service of the garnishment writ the garnishee had on hand rents from said premises in the sum of $187.85, and that it collected the additional sum of $340 between the date of service of the garnishment writ and the filing of its answer.

The principal ground urged for reversal of the judgment entered in favor of the garnishee is that the garnishee was an agent of the

defendants Hopfner et al., and that funds in its hands as such were subject to garnishment. This contention is based upon an agreement dated February 24, 1936 (almost two years after the assignment of rents was executed) between the Belmont Realty Company and George Hopfner, one of the owners of the equity, which reads as follows:

"AGREEMENT.

"This Agreement made and entered into this day of February 24, A. D. 1936, by and between the Belmont Realty Company, hereinafter called 'first party,' and George Hopfner owner of the premises at 3062-74 Lincoln Avenue, hereinafter called 'second party,' both of the City of Chicago, State of Illinois, and County of Cook,

"Witnesseth:

"Whereas, the first party is now managing the premises for the second party at 3062-74 Lincoln Avenue, and

"Whereas, the Federal Government has passed an act known as the 'Federal Social Securities Act' and the State of Illinois may pay similar legislation providing for a tax to be levied on the employees' payrolls.

"Now, Therefore, it is hereby understood and agreed by and between the parties as follows:

"1. That all persons employed at the premises of the second party which the first party is now managing shall be deemed to be the employees of the second party.

"2. That the second party shall file all employment and payroll returns of every kind and character which may be required by the State of Illinois, the United States of America, or by any other governmental authority, and the second party shall pay such tax as may be levied when due.

"In Witness Whereof the parties hereto have caused these presents to be signed, the corporation by its duly authorized officers, affixing hereunto its corporate seal, and the second party in his proper manner, the day and year first above written.

"Belmont Realty Company,
By Wm. Wahlstrom,
Vice-President

"Attest:
By J. L. Budlong,
Secretary.
George Hopfner."

It is argued that this agreement "clearly shows that the garnishee was acting as manager of the premises for the defendants, the owner of the premises in question." It appears, however, from the evidence of Budlong, secretary of the Belmont Realty Company, as well as from the agreement itself, that the parties merely intended by this agreement to confine the same to matters relative

to the Social Security Act. The agreement makes no reference to the fact that the rents were being collected by the Belmont Realty Company nor to the management of the building by mortgagee through its affiliat , nor to any change in the previous position of the parties, and it is in deed difficult to understand how it could affect or modify the status of the parties as determined by the assignment contract of July 24, 193 , or affect the status of the rents received by reason of such assignment. The Belmont Realty Company had no interest in the property or in the mortgage indebtedness, but was merely a collecting and managing agent, affiliated with the mortgagee, and the assignment of rents by the trustee for the owners to the Belmont Realty Company was undoubtedly made with the consent of the mortgagee and with its entire approval. Under the circumstances, the Belmont Realty Company could not by any agreement made with Hopfner change the relationship of the parties nor affect the status of the assignment made about two years before.

Plaintiff argues that the various conveyances by the defendants merely constitute a mortgage on the premises in question and do not deprive the defendants of the rents until the mortgagee takes some steps to enforce its mortgage, and they say that since a receiver was never appointed, the owners of the equity were still entitled to the rents collected by the Belmont Realty Company. This argument overlooks altogether the plain intendment and effect of the assignment of rents. While it is true that the Belmont Realty Company was not the mortgagee, the rents were assigned to it by the trustee of the owners with the approval and apparently upon the direction of the mortgagee, and for all practical purposes the Belmont Realty Company was agent for the mortgagee and not for the owners. Under the contract of assignment the owners were not entitled to the rents until the mortgage indebtedness was extinguished. The assignment was unqualified except that it required the Belmont Realty Company to pay

interest on the mortgage indebtedness, maintain the property, and to apply the balance of the money to current and delinquent taxes. There is nothing in the agreed facts to indicate that the mortgage indebtedness was ever paid, and when the garnishment proceedings were instituted the assignment was still in full force and effect. The law is well settled that property and credits which have been validly transferred or assigned by the defendant cannot subsequently be subjected to garnishment as belonging to him. (28 Corpus Juris 105, sec. 142 (b); Mayr v. Hodge and Homer Co., 75 Ill. App. 556; Williams v. West Chicago, 199 Ill. 57.) Belmont Realty Company had a paramount title to the fund on hand superior to the mortgagor, the defendants or other creditors.

During the pendency of this appeal the appellees moved to dismiss the appeal. That motion was reserved to the hearing, and is now denied.

The case was fairly tried, and we think the court properly entered judgment in favor of the garnishee under its answer. Judgment of the municipal court is therefore affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

39628

THOMAS CROPPE and JOSEPH MALIN,
Plaintiffs,

v.

CENTRAL ILLINOIS PRODUCE COMPANY,
a corporation,
Defendant.

JOSEPH MALIN,
Appellee,

v.

CENTRAL ILLINOIS PRODUCE COMPANY,
a corporation,
Appellant.

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

295 I.A. 234

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Thomas Croppe and Joseph Malin sued Central Illinois Produce Company, a corporation, and Lawrence Dobson for personal injuries sustained in an accident which occurred on December 10, 1935, at 5:45 a.m., at the intersection of 47th street and Joliet road, located at the outskirts of Cook county. By the amended complaint Dobson was dismissed from the case. A jury returned a verdict finding defendant Central Illinois Produce Company, a corporation, guilty, and awarding Joseph Malin damages in the sum of $5,800 and Thomas Croppe damages in the sum of $12,900. In response to a special interrogatory the jury answered that the truck was driven in a wilful and wanton manner as charged in count two of plaintiffs' complaint. Judgment was entered upon the verdict and defendant Central Illinois Produce Company, a corporation, appealed. Thereafter, by stipulation of counsel, the appeal of defendant from the verdict and judgment entered in favor of Thomas Croppe was dismissed "without prejudice to the rights of the appeal of the Central Illinois Produce Company and the judgment and verdict entered in favor of

Joseph Malin."

On December 9, 1935, Roland Doyle, a farmer, living at Henry, Illinois, employed defendant corporation to transport a load of cattle from his farm to the stockyards in Chicago. Defendant sent its truck, with a trailer attached, from its place of business, at Princeton, to the Doyle farm. Doyle accompanied Dobson, the driver of defendant's truck, on the trip to Chicago. The truck and trailer, together, were thirty-four feet long. There were headlights on the truck, reflectors on the sides of the trailer, and a tail light. Dobson had been in defendant's employ about six and one-half years. Fourteen head of cattle were loaded on the trailer and at nine o'clock p.m. they left the farm and drove to Sandwich, Illinois, where they stopped for gas and oil, and to eat. When they reached a point about two miles west of the intersection of 47th street and Joliet road it began to snow and Dobson reduced the speed of the truck to about ten or fifteen miles per hour. They proceeded east on 47th street until they arrived at the intersection of Joliet road, which is a state highway and runs in a northerly and southerly direction. 47th street is an east and west street and is a paved highway. Each highway is forty feet wide and has four traffic lanes. There was a stop sign on 47th street just west of Joliet road. Approaching 47th street there were caution signs along Joliet road.

At the time of the accident Joseph Malin lived at 2433 Greenview avenue, on the north side of Chicago, and was working at 107th street and Archer avenue, in Sag, Cook county. He owned the Ford car that ran into the truck. That morning he started for his place of employment and, as was his custom, picked up Croppe, at Western avenue and Madison street. Malin was proceeding south on Joliet road at the time of the accident. 47th street "goes down"

approaching Joliet road. As you reach the road it rises in an incline about a foot and a half, making a depression on the west side of the road. It is conceded that Dobson did not stop the truck as it approached Joliet road. Defendant's theory of fact was that the decline part of the highway on 47th street and the depression on the west side of Joliet road were covered with ice and that in spite of the fact that Dobson, as he approached the intersection, applied the brakes in an effort to stop the truck, nevertheless, the truck skidded twelve to fifteen feet into Joliet road before it came to a stop. It is conceded that the Ford was driven into the side of the trailer. The evidence for defendant shows that the Ford crashed into the tool box, which was attached to the truck about eight or nine feet from its rear end. Croppe testified that the Ford ran into the truck about eight or ten feet from the rear end. Immediately after the accident an examination showed that the tool box had been badly damaged by the collision. Dobson testified that after he brought the truck to a stop on Joliet road he saw plaintiff's automobile, which was then approximately 450 to 500 feet north of 47th street; that he then proceeded to drive the truck off the intersection at a speed of approximately one to two miles per hour; that the front end of the truck was about five to seven feet east of the east edge of Joliet road when plaintiff's car crashed into the trailer; that after the accident automobiles going south on Joliet road passed between the rear end of the truck and the west curb of the road; that there was ample room for them to pass. It was undisputed that there were no other vehicles near the intersection at the time of the accident.

Seven points are urged by defendant in support of its argument that the judgment should be reversed. In our view of this appeal we need notice but two: Defendant contends, inter alia, that the manifest weight of the evidence shows that (1) the truck was not driven in

[illegible]

[illegible]

a wilful and wanton manner as charged in count two of the complaint, and (2) that plaintiff was guilty of contributory negligence. After a careful examination of all of the evidence we are satisfied that both of these contentions must be sustained.

Plaintiff states his theory as follows: "Plaintiff's theory in this case is that the accident which resulted in injuries to the plaintiff was the result of the defendant's wanton and wilful conduct in failing to stop for a state highway and proceeding across in violation of the statute, failed to yield the right of way to plaintiff's machine which was traveling on the state highway." Defendant states its theory as follows: "That its driver having applied his brakes as soon as he saw the stop sign, and having stopped in or near the intersection, in full view of the plaintiff at a time when the plaintiff was four hundred to five hundred feet away, that it was not negligence on the part of the defendant's driver to attempt to drive the truck across the intersection. The defendant, in skidding into the intersection, because of the ice hidden in the depression of the road, was not guilty of negligence, or of wilful and wanton conduct. That the plaintiff, in failing to take any steps to stop or slow down, although defendant's truck was in full view in the intersection ahead of him, was guilty of contributory negligence."

Plaintiff assumes, throughout his argument, that the accident was the result of Dobson's wantonly and wilfully failing to stop for a state highway and failing to yield the right of way to plaintiff's machine. While we do not deem it necessary to pass upon the question as to whether or not Dobson was negligent in not stopping at the intersection, we may say that the jury would have been fully warranted in finding that he attempted to stop, but that the ice on the decline on 47th street and the depression on the west side of Joilet road caused the truck to skid onto Joliet highway in spite of his efforts to stop

the truck. The fact that Dobson stopped the machine after he had gone a part of the way across the road strongly corroborates his testimony that he tried to stop at the intersection. The evidence of Philip Schultz, who was then a Cook county highway police officer, also corroborates Dobson's testimony. Indeed, Croppe's testimony, in parts, supports Dobson's evidence. The special finding by the jury that the truck was driven in a wilful and wanton manner was not warranted by the evidence. Indeed, it is difficult to understand how the jury reached such a finding, under the facts and circumstances of the case.

As to the question of plaintiff's contributory negligence: Dobson testified that as he brought the car to a stop on Joliet road he saw plaintiff approaching; that the latter was then at a distance of from 450 to 500 feet and that because he, Dobson, was on the highway he then proceeded, slowly, to cross the remaining twenty-eight feet of the intersection, and that the front of his truck was seven or eight feet east of Joliet road when the automobile hit it. Malin admitted that when he was 300 or 400 feet north of 47th street he saw the truck and that it was then 200 feet west of the intersection; that the truck was going about twenty-five miles per hour at that time; that he was going about thirty miles per hour; that he noticed the truck again when it was about thirty-feet west of the intersection; that at that time he was eighty to one hundred feet north of the intersection; that he saw the truck slow down to a speed of five to eight miles per hour and he then reduced the speed of his car to twenty miles per hour; that at that speed he could stop his car in from twenty-five to thirty feet; that he was going about fifteen miles per hour when he crashed into the truck. "Q. Was this truck stopped at the time you ran into it? A. I couldn't swear to that. If he was moving, he moved very slow, I don't think he was going over two miles an hour when I struck him. My best judgment, he was just about to stop." The witness

further testified that during the last one hundred feet he traveled before the contact the truck was in full view all the time. Croppe, who was riding with Malin, testified that when they were eighty feet away from the point of the collision he saw the truck, which was then thirty-five feet in Joliet road; that he then cried to Malin, "Watch that fellow, Joe!" and Malin then "took his foot off the accelerator and slackened up;" that he then saw the truck "slacken up" and then start again; that the truck was just over the center line of Joliet road at the time of the collision; that "Malin and I saw the truck about the same time. It was in full view. It had headlights." The witness testified that he did not remember whether at the time his deposition was taken he stated that the truck was not going over two miles per hour at the time of the collision. The following then occurred: "Q. And wasn't the front end of the truck past the east side of Joliet Road at the time of the collision? A. Two feet, yes." Officer Schultz testified he arrived at the place after the accident and questioned Dobson and Malin concerning the accident; that Dobson told him that he tried to stop for the stop sign, but skidded out into the road. The witness further testified that "there was ice in that low spot of Joliet Road and 47th. It snowed and then it froze and then in spots it was a little wet and then it froze again." The witness further testified that he found the truck on the east side of the road; that the rear end of the truck was one and one-half lanes east of the west side of Joliet road. The following then occurred: "Q. How much of Joliet Road was clear, behind this trailer or truck going in a southerly direction? A. There was a lane and a half, and then those shoulders and all to go around it." The witness further testified that after he had talked with Dobson he said to Malin, "What the hell is the matter, do you want to commit suicide?" to which Malin replied, "Nothing of the kind;" that the witness then said to Malin,

"Didn't you see the truck?" to which Malin replied, "Well, we were talking with Croppe and before I noticed it I saw a big figure in front of me and I couldn't stop." The evidence shows clearly that before the collision there was ample space between the rear end of the truck and the west curb of Joliet road for Malin to proceed southward on the road. As we read this record it seems plain that the manifest weight of the evidence supports the contention of defendant that Malin was guilty of contributory negligence at the time of and just prior to the collision.

The judgment of the Superior court of Cook county in favor of Joseph Malin, appellee, and against Central Illinois Produce Company, a corporation, appellant, is reversed, and the cause is remanded for a new trial.

JUDGMENT IN FAVOR OF JOSEPH MALIN AND AGAINST CENTRAL ILLINOIS PRODUCE COMPANY, A CORPORATION, REVERSED, AND CAUSE REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

39648

JOHN FIIKO, trading as
F & B MFG. CO.,
Appellee,

v.

DE GRAFF, LTD., a Corp.,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

2 S 1.A. 624

MR. JUSTICE MCMILLAN DELIVERED THE OPINION OF THE COURT.

This appeal arises out of an action brought in the Municipal court of Chicago for goods, wares and merchandise sold and delivered to defendant, on which it is alleged a balance of $448.19 remains unpaid. Defendant filed an amended affidavit of defense alleging that the merchandise sold and delivered was defective in that it consisted of permanent waving machine parts to be used in assembling permanent waving machines, and that said parts were ordered for the purpose of being so assembled and were warranted by plaintiff to fit other parts, but that certain parts manufactured did not fit other parts, so that it was impossible for defendant to use them in its assembling operations. Plaintiff filed affidavits in support of a motion for a summary judgment. Defendant filed an "affidavit of merits to the affidavits for summary judgment;" also affidavits in support of the affidavit of merits. Upon the hearing of the motion by the trial court plaintiff introduced in evidence, with the consent of defendant, two letters written by defendant to plaintiff. Neither side called any witness to testify, and defendant offered no documentary evidence. The trial court, upon a consideration of the pleadings, the affidavits offered in support of and against the

motion for a summary judgment, and the two letters introduced in evidence, entered a judgment against defendant for $448.19. The latter appeals.

The motion for a summary judgment was based upon Section 3 of Rule 111 of the Revised Civil Practice Rules of the Municipal court of Chicago, in force November 1, 1935, which provides:

"When the plaintiff's statement of claim is verified in the manner stated in the preceding paragraph and the defendant's defense or defenses is or are verified by an affidavit or affidavits and the plaintiff shall file an affidavit or affidavits of himself or of some other person or persons having full knowledge of the facts alleged in the statement of claim setting forth the belief of the affiant or affiants that the defendant's defense or defenses is or are not made in good faith but only for the purposes of delay, and setting forth the facts upon which such belief is founded, and shall move the Court to strike out such defense or defenses and enter judgment by default against the defendant, the Court may, upon a hearing of such motion upon affidavits, or after examination of parties or affiants in open court, if satisfied such defense or defenses is or are not made in good faith, strike the same out and enter judgment for the defendant accordingly."

The primary purpose of this rule is to prevent vexatious delays where the defense set up is not made in good faith. Defendant's contention is that its affidavit of merits presents a legal defense to the claim of plaintiff and "creates an issue of fact which cannot be determined in a summary judgment proceeding, but should be submitted to a jury," and that "the court erred in entering a summary judgment when both by the statement of claim and affidavit of merits, as amended, and by the affidavits for summary judgment and the affidavits of merits to the affidavits for summary judgment, a clear issue of facts was made up between the parties which should have been submitted to a jury." In the instant case the trial court was satisfied that the defense was not made in good faith, and after a careful consideration of the record, we have reached the conclusion that the action of the trial court was fully justified. e agree with defendant's argument that a trial court, in considering a motion for a summary judgment, should not pass upon the credibility of witnesses nor determine the weight of evidence. A trial court, in our opinion, should not allow the

motion unless undisputed facts material to the issues clearly show that the defense is not made in good faith. But in the instant case the record discloses certain undisputed facts and circumstances that justify the judgment.

The judgment of the Municipal Court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

39666

LOUIS M. PROESEL,
Appellee,

v.

COMMERCIAL CASUALTY INSURANCE COMPANY, a corporation,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

293 I.A. 024

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

In the suit of Louis M. Proesel v. Alice G. Ratner et al., filed in the Circuit court of Cook county, a receiver was appointed for the premises known as 340-342 East 56th street, Chicago. The defendant executed a complainant's bond, in the sum of $300, in connection with the said order, by the terms of which it agreed to pay plaintiff all damages, including reasonable attorney's fees, sustained by reason of the wrongful appointment of the receiver in case his appointment was revoked or set aside. On April 22, 1936, the Third Division of this court reversed and set aside the order of the Circuit court appointing the receiver (Louis M. Proesel, Appellant, v. Alice G. Ratner et al., Defendants. - Morris-Hard Coal Company, a Corporation, Appellee, 185 Ill. App. 128). Plaintiff then sued defendant upon the bond, and on February 10, 1937, in a trial by the court, judgment was entered in favor of plaintiff and against defendant for $262.20. Defendant appeals.

After defendant filed a notice of appeal from the judgment it filed a motion in this court to make the notice of appeal a supersedeas. Plaintiff filed objections to the motion on the ground that the appeal was a frivolous one and without merit. After a careful examination of the record, we denied the motion for a supersedeas.

Plaintiff later filed in this court a motion to dismiss the appeal on the ground that the judgment appealed from had been paid in full and satisfied of record and that nothing remained for this court to decide save an abstract question of law. Defendant filed objections to the motion and we reserved ruling upon the same until the cause was finally determined.

After a further consideration of the appeal, we adhere to the conclusion we reached upon a consideration of the motion for a supersedeas, that the appeal is a frivolous one and without merit. We feel impelled to say that it is surprising to us that the defendant should have seen fit to appeal from the instant judgment. The following are the items that were allowed by the trial court: Paid to clerk of the Circuit court for transcript of record, $5.00; paid to said clerk for additional transcript of record, $3.00; paid to clerk of the appellate court for appearance fee, $20.00; premium paid for appeal bond, $10.00; premium paid for supersedeas bond, $10.00; costs of printing abstract, $26.58; cost of printing brief, $18.34; costs of printing reply brief, $12.88; amount allowed for attorney's fees, $156.40. These items make a total of $262.20, the amount of the judgment. The record shows that defendant admitted all the items save the amount of attorney's fees.

Defendant contends (1) that the court erred in sustaining plaintiff's motion to strike paragraphs 1 to 8 of defendant's affidavit of merits, and (2) that the court erred in refusing to consolidate the instant cause with the suit of Norris-Ward Coal Company v. Proesel. The contention is without the slightest merit. In the said eight paragraphs defendant sought to plead in bar of the instant action an unrelated cause of action based upon an alleged claim due the Norris-Ward Coal Company, a stranger to the instant suit. It is the law that cases having different parties cannot properly be consolidated.

The other contentions relate to the amount allowed plaintiff for attorney's fees. It is not the law that plaintiff was obliged to prove that he had an agreement with his attorney to pay him an amount equal to that allowed. It was necessary to prove that the charge was the customary and usual one by reputable attorneys for like services, and the amount allowed should not exceed that charge. We are satisfied that the trial court was justified, under the evidence, in allowing the amount in question. It is true that one of the two lawyers testifying for defendant upon the question of reasonable fees stated, upon direct, that he thought $50 would be a proper amount. Upon cross-examination he testified that "possibly 100 would cover it." It is also true that one of the two lawyers who represented defendant testified that he thought $75 would be a fair, reasonable, usual and customary fee. The trial court considered all the facts and circumstances and allowed plaintiff, not what he asked, $194.20, but $156.40. We approve the finding. We repeat, it is surprising that defendant should have seen fit to appeal from the instant judgment.

Plaintiff's motion to dismiss the appeal is denied.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

39668

NORTHWARD COAL COMPANY,
a corporation,
Appellee,

v.

LOUIS M. PROSEL,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

293 I.A. 324

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment entered against him in the above entitled cause in the sum of $262.20. Plaintiff's statement of claim alleges that defendant was the plaintiff in a foreclosure suit brought in the Circuit court of Cook county to foreclose a mortgage on the premises, 340-342 East 56th street, Chicago; that a decree of foreclosure was entered therein; that at a master's sale held November 23, 1932, defendant was the purchaser of the property; that Milton M. Marcus, at the instance of defendant, was appointed receiver of the premises and acted as such until the period of redemption expired on February 24, 1934, when the master's deed was issued to defendant; that plaintiff's claim is for $287.20 for coal sold and delivered to Marcus at his special instance and request during November and December, 1933, and January and February, 1934; that the coal was a necessary expense and was used by the receiver in the maintenance and operation of the premises; that Marcus, as such receiver, presented his final account and report to the court on March 27, 1934, upon due notice to defendant, but without notice to plaintiff, and the court entered an order approving the final account and report and directing defendant to assume and pay certain unpaid liabilities

incurred by the receiver; that included in the said liabilities was the $287.20 due plaintiff; that thereafter defendant paid to plaintiff, on account, the sum of $25, leaving a balance due plaintiff of $262.20. Defendant's verified "defense" admits the allegations as to the foreclosure proceedings, his purchase of the premises at the master's sale, the appointment of Marcus as receiver at the instance of defendant, and that Marcus acted as such receiver until the redemption period expired. It denies that Marcus was duly appointed receiver, and admits that he, as such receiver, presented his final account and report in the foreclosure proceedings on March 27, 1934, "upon due notice to the defendant, Louis Proesel, and without any notice to plaintiff and thereafter said Circuit Court entered an order approving said final account and report and in said order directed said defendant, Louis Proesel, to assume and pay certain unpaid liabilities incurred by said receiver as follows: 'It is further ordered that Louis Proesel, complainant herein, be and he is hereby directed to assume the unpaid liabilities in the aggregate amount of $513.26, and the outstanding balances for electric light from February 1, 1934, to March 8, 1934; water bill from February 10, 1934 to March 8, 1934; and hauling ashes from March 1, 1934 to March 8, 1934; for which bill has not as yet been rendered.'" The affidavit of merits denies that defendant paid plaintiff $25 on account of the indebtedness.

Defendant contends that "Marcus was never appointed receiver of the property by order of the Circuit Court and therefore had no legal authority to operate the premises in foreclosure or to contract debts in connection therewith." This contention is without the slightest merit. Defendant was the complainant in the foreclosure suit and procured the order appointing Marcus successor receiver. It appears that in the order blank used in the appointment of receivers several spaces were provided in which to write the name of the receiver

appointed. Through the negligence of defendant or his counsel the name Milton Marcus was not written in one of the spaces. But further on in the order the name Milton Marcus was inserted and he was ordered to "file his surety company bond in the amount of $1,000 within 5 days from the date hereof to be approved by the Court." In the appeal filed by defendant from an interlocutory order appointing one Geisler receiver for the premises (Proesel v. Ratner, 285 Ill. App. 128) defendant stated in his brief: "On March 27, 1934, Milton M. Marcus filed his final report and was discharged herein from further duty as successor receiver, and Louis M. Proesel was directed to assume the unpaid liabilities contracted by Milton M. Marcus during his administration of this property." Defendant concedes that Marcus qualified by giving the bond required by the order and that he acted as receiver under the order. Marcus filed his first account and report as such receiver, and his final report and account, and defendant appears to have interposed no objection to either report. He admits that he had notice that the final report would be presented to the court. Defendant not only had Marcus appointed receiver but recognized him as such during the latter's administration of his office. He is now estopped from claiming that Marcus was not legally appointed or competent to act. (See Roby v. Title Guarantee, etc., Co., 166 Ill. 336, 342.) Even though the appointing order was somewhat defective, nevertheless, Marcus assumed all the functions of a duly appointed receiver and would be considered, in law, a de facto receiver, and his acts valid. (Barlow v. Standford, 82 Ill. 298, 302.)

The contention of defendant that plaintiff failed to prove delivery of the coal by competent, legal evidence is without the slightest merit.

In support of a contention that the order of the Circuit

court directing defendant to assume a debt contracted by Marcus was void, defendant states: "We concede that the Circuit Court had jurisdiction of the parties, including Louis M. Proesel, as well as the subject matter of the foreclosure case; but we respectfully submit that that subject matter in the foreclosure case was co-extensive only with the rights of the parties in the rem, and that the court had no power or authority to enter an order transferring a personal and contractual obligation from one party to another, by compelling Louis M. Proesel to assume the debts contracted by Milton L. Marcus." Defendant not only did not appeal from that part of the order that he now questions, but acquiesced, apparently, in the entry of the same. But to escape the effect of the order he now contends that the court was without jurisdiction to order him to assume the unpaid liabilities of Marcus. The solicitor for Marcus served upon defendant's solicitors a notice that the second and final report of Marcus would be presented to the court for approval, a copy of which was attached to the notice. The notice also stated that the receiver would ask for an order in conformity with the prayer contained in the report. Defendant's solicitors acknowledged the receipt of a copy of the notice. The final report of the receiver concluded with a prayer "that an order may be entered herein * * * (5) directing Louis Proesel, complainant herein, to assume the unpaid liabilities in the aggregate amount of $513.26, and the outstanding bills heretofore referred to for which bills have not as yet been rendered; * * * (5) discharging the undersigned and his said solicitor from any further duties, obligations and liabilities as such successor Receiver and such solicitor, respectively." In the list of unpaid bills attached to the receiver's report appears that of plaintiff. Defendant was desirous of obtaining immediate possession of the premises, and the only reasonable conclusion that can be drawn from

the record is that he acquiesced in the entry of the order, as he thereby obtained possession of the premises. Had not the provision in question been included in the order, the trial court would have retained the receivership until some provision was made for the payment of bills that had been incurred in the upkeep of the building that defendant owned. It is admitted that plaintiff had no notice that the receiver would present his final report and account to the court for approval. No other reasonable conclusion can be drawn from the record than that defendant had the order provide that he should assume the unpaid liability, or that the trial court had the order so provide, before he would discharge the receiver. There is no equity in the instant contention. To gain immediate possession of the property defendant was willing to induce the trial court to enter the order, although it now appears that he intended to evade, if possible, that part of it that required him to pay plaintiff's bill.

The judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

39743

RALPH ISHAM, ARTHUR LINCOLN FARWELL, EDWARD J. BERMINGHAM, HENRY PORTER ISHAM and ARTHUR FARWELL, Trustees, under Trust Agreement dated May 10, 1928, Appellees,	)	APPEAL FROM MUNICIPAL COURT OF CHICAGO.
v.	)	
CHARLES KEER, Appellant.	)	293 I. A. 524

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment in favor of plaintiffs in a forcible detainer suit to recover "possession of the premises occupied as a store on the first floor situate and known as 328 South State street, Chicago." Defendant occupies the store under a written lease with plaintiffs which expires April 30, 1938, but it contains a ninety days' cancellation clause. The rental was fixed at $350 monthly. About the middle of December, 1936, plaintiffs served on defendant a written notice of cancellation of the lease under the said clause. Plaintiffs' attorney decided that said notice was defective, and plaintiffs, on January 29, 1937, served on defendant a new ninety days' cancellation notice which called upon defendant to surrender possession of the premises on April 30, 1937. The instant suit was brought after defendant refused to surrender possession of the premises.

The sole contention of defendant is: "Although the lease was in writing and under seal, the right to terminate it by 90 days' notice could be waived by parol and the plaintiffs did so waive it. Having, by the waiver of their first notice to terminate the lease and by their assurances to defendant, caused him to act upon their waiver to his prejudice, the plaintiffs were estopped from serving any further 90 day notice to terminate the lease." As to the alleged

waiver and estoppel defendant testified that after he received the first notice of cancellation he and his brother, Louis Keer, called upon C. A. Hunter (associated with Hogan & Farwell, the renting agents for plaintiffs); that Louis asked Hunter why he sent the notice, and the latter said, "The rent is raised from $350 to $400;" that Louis said that defendant was "making a little living there, make it a little better;" that Hunter said, "I can't;" that Louis said to the witness, "Are you willing to pay, that amount?" to which the witness responded, "I will pay $400, I don't want to move, I want to stay a couple of years;" that Louis then said to Hunter, "All right * * *. Give him a lease," to which Hunter answered, "All right, Mr. Keer, go along, I see you later. I will send you the lease in a few days. Q. For two years? A. Yes. Q. For two years at $4 0. A. Yes;" that Hunter then said to the witness, "You can go buy." The witness further testified: "So I paint that store, and I fixed a little bit, because I was ready to stay in business, and I paint up the store and I make it better, and after, I bought the merchandise * * * for the whole summer;" that he bought about $15,000 or $16,000 worth of goods; that he never received the two years' lease from plaintiffs. Plaintiffs moved to strike the testimony in reference to the two years' lease, on the ground that it violates the statute of frauds. The court ruled that it might go in, subject to the objection. Louis Keer testified that when he and defendant called on Hunter, the following conversation took place: "I says, 'Mr. Hunter,' I says, 'I came here to see if I can straighten it out between you two of them, on account of the wording of your lease that you have with him, in power now, that you can tender him a ninety days' notice, and he has to vacate it, and that is what he has got. Can we in some way straighten out the matter where he can remain in possession?'

He says, 'I will think about that again,' he says, 'Mr. Keer, his place now, he has got to pay $400 a month,' and he takes out a yellow carbon copy paper and he shows me where his store is leased now at $400, and the next door, it used to be $400, $500, and so forth. I says to him, I say, 'Tell me, Mr. Hunter, can't you do anyt ing better?' He says, 'No, that is the price he will have to pay. Our taxes are raised,' and so forth and so on. 'Well,' I says, 'My brother is willing to pay $400.' My brother was right with me, and he was endorsing my statement I made to him. He was satisfied on this subject;'" that Hunter said,"'Q. A. I will make you a lease. * * * I will have a lease for you. Now, it is a couple of days before Christmas, it is busy, but you have a lease in possession now, and you have nothing to worry about. We don't have to give you anyt ing in writing.' I asked him to give something to that effect that our deal was consummated, but he said, 'Your brother is in possession now and you have nothing to worry about it.' I says, 'This man can go in and do some purchasing of some merchandise on the strength of the lease that is going to come up?' * * * A. He says, 'Mr. Keer,' he says, 'as far as your brother and our office is concerned, we are 100 per cent. He pays his rent on the 1st of the month, and we never had any trouble with him and we don't expect any trouble in the future. You go ahead,' and he says, 'we will have the lease for you.' And I says, 'With that understanding, then he can go ahead and do his buying and preparation on anyt ing else that he needs?' And he says, 'Yes, go ahead,' to my brother, and that was our deal." The following then occurred: "Q. Did he tell you how long a term lease he was going to give you? A. Well, the lease was supposed to be a two year lease." Plaintiffs' motion to strike the testimony in reference to the alleged lease on the ground that "the statute of frauds provides that a lease for more than one year must be in writing," was taken

under advisement by the court. Hunter, called to the stand by defendant, testified that the latter came to his office in April, 1937, and stated to him that he intended to stay in the premises; that he told defendant that he "intended to start suit for the premises, if he would not vacate, I would get a notice to vacate, I wanted him to vacate." The witness further testified: "He [defendant] came in twice. * * * Each time he came in, he offered additional money over and above what is called for in my lease, and I told him I would not renew the lease with him." The witness further testified, "We don't want Mr. Keer in the premises. It is very important that we not have him in there, because we can't have him, depend upon him to get out. We have to have this store and the next store available." When Hunter was called as a witness by plaintiffs he testified that after the notice had been served upon defendant in December, 1936, the latter and his brother called to see him, about the middle of that month; that the following occurred: "The Witness: Mr. Keer asked me if I would renew his lease, make a new lease there at a higher figure. And I said I would, subject to the approval of the owners of the property. Q. Did you ever secure the consent of the owners of the property? A. No. Q. Was there a lease ever executed? A. We never arrived at any terms, Mr. White. Q. Now, when was the next conversation that you had, if any, with Mr. Keer? A. Within a few days after this conversation, Mr. Louis Keer called me on the telephone and asked me if I was going to go ahead with them on the renewal of the lease, and I told him, - Q. What did you say? * * * A. Within a few days after this conversation, Mr. Keer, Louis Keer, called up on the phone and asked me if I was going to renew the lease with his brother. I told him that I was not. He said that he would cause trouble and stay in the premises, his brother would stay in the premises regardless of the notice. I thereupon notified my

attorneys, Adams, Adams & White, and they sent him a notice. * * * Mr. Keer, at the time he was in there, asked me why I wouldn't renew, and if I wouldn't renew to him, and I told him at all times I would not. * * * He stated several times when he was in, he wanted to go ahead and buy merchandise. Mr. White: Q. And what did you say? A. I said that if I were him, I wouldn't do it; he could use his own judgment, but there would be no renewal of the lease. Q. You told him there would be no lease? A. That is right. Mr. White: That is all." Upon cross-examination the witness testified: "Q. When did you say there would be no lease? A. I told Mr. Louis Keer, at the first time when they came in there, when they made their proposition to me, I told them I would let them know in a day or two. When he called up, I told him there was no possibility of going ahead with it. * * * Q. By the way, they also tendered you $400 on May 1st, didn't they? A. That is right. Q. Now, when this man was present on April 1st, did you say in substance the following: 'Yes, I agreed to make them a lease for two years more, but I changed my mind?' A. No, I did not say that." Herman Pollakov, called by defendant, testified that he was present in the office of Hunter on or about April 1, 1937, and the following occurred: "Well, we offered the rent to Mr. Hunter, and he says, 'Nothing doing, Mr. Keer.' And Mr. Keer started talking to him, and he says, 'Why do you refuse to let me stay in the premises?' Well, he mentioned something about his brother, Louis Keer, which I don't know what he meant by it, and he says, 'I don't want you in the store.' Well, finally, * * * I talked to Mr. Hunter, and I said, 'Mr. Hunter, isn't it true that they did make an agreement with you on a new lease?' Mr. Hunter said, 'Yes, I did make an agreement with them, but I have changed my mind since then.' It is exactly what he said." Upon cross-examination the witness testified that he was a shoe salesman for defendant and that the latter "wanted him to go along as a witness." Defendant was then recalled as a wit-

ness and was asked to give the conversation that took place in the office of Hunter on April 1, when Pollakov was present. The following is his answer to the question: "I was with Mr. Pollakov and Mr. Hunter on April 1st in Mr. Hunter's office. He said, 'Nothing doing Mr. Keer, I don't want the check.' I asked, 'Why, Mr. Hunter? I am two years in your store, and I treat you nice. I send you a check always the 31st, before the 1st of the month. I never bother you, never call you.' He said, 'I don't want it, I don't want you.' I said, ' hy? I made agreement with you about a lease.' He said, 'I didn't send you, I didn't give it to you.' And that is all what it was. This was the time the April 1st rent was offered to him. I offered $400." It will be noted that defendant did not corroborate the testimony of Pollakov as to the statement that the latter claimed Hunter made to him.

It would be a sufficient answer to the contention of defendant to say that the trial court found against him as to the alleged oral agreement. efendant assumes that because he produced more witnesses than plaintiffs as to the alleged agreement it follows that he proved the agreement by a preponderance of the evidence. It is evident from the opinion of the trial judge that he did not believe the testimony of defendant's witnesses as to the alleged agreement. He stated, in his opinion, that the evidence indicated that defendant refused to take "No" for an answer. Defendant admits receiving the ninety days' cancellation notice on January 29, 1937, and that he never received any lease or writing in connection with the alleged oral agreement. fter the conversation in December he did not talk to Hunter until April, 1937, at which time he tendered to Hunter $400 in payment of the April rent. Hunter testified that within a few days of the conversation in December, Louis Keer called him on the telephone and asked him if he was going to renew the lease with defendant; that he answered that he was not going to

[illegible]

the office of [illegible]

[illegible]

and Mr. [illegible]

[illegible]

[illegible]

I found [illegible]

I never had a [illegible]

[illegible]

Lorne." He said, "I [illegible]

[illegible]

offered to [illegible]

[illegible]

about the [illegible]

It would [illegible]

and to say [illegible]

oral agreement. [illegible]

[illegible]

that he proved [illegible]

to [illegible]

[illegible]

[illegible]

[illegible]

only, the ninety days' [illegible]

and that he never [illegible]

the alleged oral agreement. [illegible]

did not talk to Herbert until [illegible]

to Hunter [illegible] in person on the [illegible]

within a few days of the [illegible]

him on the telephone and asked him if he was [illegible]

renew the lease; that Louis responded "that he would cause trouble and his brother would stay in the premises, regardless of notice." Louis did not deny this testimony. The cancellation notice of January 29, 1937, was never withdrawn, and the instant suit was commenced May 3, 1937. The trial court thought it very strange that defendant, a State street merchant, although he did not receive the lease that he claims Hunter promised, on December 18, to send him in two or three days, but did receive the cancellation notice of January 29, had no conversation with Hunter, after the one in December, until April, 1937, although the cancellation notice terminated the lease on April 30 and demanded possession on that date.

The wise rule of law that preponderance of evidence is not necessarily determined by the greater number of witnesses, was born of experience. If the law were otherwise, many cases would be determined by witnesses whom the jury or trial court disbelieved. However, the question of the preponderance of the evidence does not arise in this court. We cannot disturb the finding of the trial court unless it is clearly against the manifest weight of the evidence. "Manifest" means clearly evident, clear, plain, indisputable. After reading the entire evidence bearing upon the question of the alleged oral agreement, we are satisfied that we cannot hold that the trial court's finding is clearly against the manifest weight of the evidence. Indeed, we are satisfied that his finding was justified under the facts and circumstances of the case. Hunter's testimony that Louis Keer stated to him in the telephone conversation in December "that he would cause trouble and his brother would stay in the premises, regardless of notice," indicates, we think, the true nature of this defense.

Defendant argues that the fact that he bought $15,000 or $16,000 worth of merchandise, which, according to his testimony,

was the usual supply, for the summer of 1937, is a strong circumstance tending to prove the truth of his theory of fact as to the alleged agreement. We find no merit in this contention. It is clear that he intended to stay in the premises in spite of the cancellation notice, and, therefore, the buying of the merchandise was necessary to his plan. He is still in possession of the premises, and it is a reasonable presumption that he bought fall and winter goods, regardless of the fact that plaintiff obtained the instant judgment against him, on June 9, 1937.

Plaintiffs also raise the following contentions: (1) "No action shall be brought to charge any person upon any contract for the sale of lands, tenements or hereditaments or any interest in or concerning them for a longer term than one year, unless such contract or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized in writing, signed by such party. (2) Lease by agent for more than one year not binding on lessor unless agent has lessor's written authority to execute lease." Defendant does not question the legal principles involved in the two contentions, but argues that plaintiffs are barred from raising them because of the alleged oral agreement. Plaintiffs are trustees, and they are before this court insisting that the terms of their written lease with defendant be enforced. In view of defendant's position it is not necessary to pass upon the legal propositions involved in plaintiffs' two contentions, but we may say that it would be a strange rule of law if an "associate" of the real estate firm that rented and leased the premises in question, could, without any proper proof as to his authority, extinguish the written lease and substitute in its place an oral agreement for a lease for a term of two years, and his action in that regard be binding upon the trustees. Defendant con-

cedes that he has no writing that has any bearing upon the alleged agreement and he seeks to prove the alleged novation by oral testimony that fails to carry conviction. Louis Keer testified that "the lease was supposed to be for a period of two years." Neither defendant nor his brother testified that anything was said by Hunter as to the time the new lease would take effect.

There is no merit in the instant appeal and the judgment of the Municipal court of Chicago is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

39214

NAHIGIAN BROS. (Inc.),
Appellant,

v.

RUG SERVICE (Inc.),
H. C. NAHIGIAN and
H. C. NAHIGIAN & SONS (Inc.),
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal by Nahigian Bros., Inc., plaintiff, from a decree entered June 20, 1936, dismissing for want of equity its complaint which sought to enjoin defendants, H. C. Nahigian, Rug Service, Inc., and H. C. Nahigian & Sons, Inc., from engaging in certain alleged unfair practices in the conduct of their business or businesses.

Upon oral argument of this cause it appeared there was a reasonable probability the parties might amicably adjust the matters in controversy between them and a suggestion to that effect was made by this court. Pursuant to such suggestion it was stipulated here by plaintiff and defendants that the decree from which this appeal was taken be reversed and the cause remanded to the Circuit court of Cook county with the direction that "by consent of the parties, in full and final settlement of the issues of this cause" said court enter a decree as follows:

"IT IS ORDERED, ADJUDGED AND DECREED:

"(a) That the defendant H. C. Nahigian & Sons, Inc., is entitled to carry on its business under its corporate name.

"(b) That by and with its consent, the defendant H. C. Nahigian & Sons, Inc., is enjoined and restrained from using the surname

'Nahigian' (except as used in its corporate name) or 'Nahigian's' unless such surname 'Nahigian' or 'Nahigian's' shall be prefixed with the initial or initials or given name or names of any of its officers having the surname 'Nahigian'.

"(c) That the defendant Rug Service, Inc., is entitled to carry on its business under its corporate name, and is entitled to represent that it is owned and operated by H. C. Nahigian and sons, and is entitled to make use of the names of its officers having the surname 'Nahigian,' provided the given name or names or initial or initials of such officer shall prefix the surname 'Nahigian'.

"(d) That by and with the consent of the defendant Rug Service, Inc., said Rug Service, Inc., be, and it is hereby, enjoined and restrained from using the surname 'Nahigian' or 'Nahigian's' in connection with its corporate name and business, unless such surname 'Nahigian' or 'Nahigian's' is prefixed with the initial or initials or given name or names of one or more of its officers having the surname 'Nahigian'.

"(e) That the defendant H. C. Nahigian, individually, is entitled to use his surname in connection with the cleaning, repairing, servicing or selling of oriental and other rugs and carpets, provided such surname shall be used in combination with a surname or surnames other than the surname 'Nahigian', or provided he shall prefix his said surname with his initials 'H.C.' or with his given name 'Hovsep', or any combination thereof.

"(f) That by and with his consent, the defendant H. C. Nahigian, individually, is enjoined and restrained from using his surname 'Nahigian' or 'Nahigian's' in carrying on the business of cleaning, repairing, servicing or selling oriental and other rugs and carpets, unless his said surname 'Nahigian' shall be used in combination with a surname or surnames other than the surname 'Nahigian' or unless he shall prefix his surname 'Nahigian' or 'Nahigian's' with his initials 'H.C.' or his given name 'Hovsep' or any combination thereof.

"(g) That neither plaintiff nor defendants shall use this decree for publication or advertisement of the outcome of this litigation."

Pursuant to the further agreement of the parties that this court apportion the costs, it is ordered that plaintiff pay two-thirds and defendants one-third of the costs taxable in the appellate and circuit courts.

For the reasons stated herein the decree of the circuit court is reversed and the cause remanded with directions to enter the consent decree hereinabove set forth.

DECREE REVERSED AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

39592

HARRIET MUSSER,
Appellee,

vs.

CITY OF CHICAGO, a Municipal Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

293 I.A. 625

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action against defendant to recover damages for personal injuries claimed to have been sustained by her on account of the negligence of defendant in failing to keep a sidewalk in a reasonably safe condition. There was a jury trial, a verdict and judgment in plaintiff's favor for $3000 and defendant appeals.

The record discloses that about 9:30 the evening of November 10, 1934, plaintiff walked to a drugstore at Coles avenue and 75th street, Chicago, which is about one and a half blocks from where she lived. In returning to her home she walked east on the concrete sidewalk on the south side of 75th street where she claimed her foot caught in the cement sidewalk, which was broken and out of repair at a point where trucks and other vehicles were accustomed to cross the sidewalk; that she fell and sustained a fracture of her left wrist. The morning following the injury she went to the Cook county hospital and was treated by the Doctors who set her arm in plaster of Paris; she then went home but later went back to the hospital where the Doctors found the fracture had not been properly reduced and it was necessary to break the injured wrist and reset it. December 4, twenty-four days after the accident, she went to see Dr. Test for treatment, which was continued up to the date of the trial, December 17, 1936.

In describing how she was injured plaintiff testified: "My

foot caught on the cement walk there, and I was tossed over. It was cement that was all torn up there. I was walking on the sidewalk. *** I wasn't looking down at my feet, but I was looking ahead as anybody else does walking. As I came along way, my foot caught right hold in all this stuff, torn up cement, and over I went, and I come down on my arm, and my foot was caught." She had lived about three weeks in the vicinity prior to the accident but had never passed on that particular sidewalk before.

Bernard C. Ulbrich, called by plaintiff, testified he had lived for the past six and one-half years near the place where plaintiff was injured. He described the neighborhood, which was a business and residential district. He testified the sidewalk was of concrete, and "there is a sort of driveway there and the concrete is broke, cracked and jagged, sunken into the sand. The broken piece is about 5 feet wide and about 9 feet long;" that it had been in that condition for more than six years. Photographs of the sidewalk at the place in question are in the record.

It is the duty of a municipality to use reasonable care to keep the sidewalks in a reasonably safe condition for ordinary traffic; and in the instant case we are of opinion that whether defendant City exercised that degree of care, and whether the sidewalk was in a reasonably safe condition, were questions for the jury. The jury found in favor of plaintiff, and upon a consideration of all the evidence in the record we are unable to say that the finding is against the manifest weight of the evidence. We are also of opinion that whether plaintiff was in the exercise of due care for her own safety was for the jury. In passing on a similar question in Puck v. City of Chicago, 251 Ill. App. 6, we said (p. 11): "Long ago our Supreme court held that a pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably

safe condition for travel, and is not absolutely bound to keep his eyes constantly fixed on the sidewalk in search of possible holes or other defects. City of Chicago v. Babcock, 143 Ill. 358; Graham v. City of Chicago, 260 Ill. App. 590. In the Graham case we said (p. 594): 'A pedestrian is not obliged to keep his eyes glued to a sidewalk, but may assume that it is in a reasonably safe condition.'" The Graham case was affirmed by the Supreme court in 345 Ill. 638, where the court said (p. 640): "A pedestrian upon a sidewalk may ordinarily assume that it is in a reasonably safe condition for travel. To hold a person absolutely bound to keep his eyes fixed upon a sidewalk in search of defects and dangerous places would be to establish a manifestly unreasonable and impracticable rule. City of Chicago v. Babcock, 143 Ill. 358."

Defendant further contends that the notice required by Sec. 2, chap. 70, Ill. Rev. Stats. 1937, p. 1774, which was served on defendant was defective, "in that it did not contain the name and address of the physician who attended the plaintiff's injuries during the twenty-four days immediately following the accident." The statute provides that any person who is about to bring an action against a city for damages on account of personal injuries, shall within 6 months from the date of the injury file in the office of the city attorney, and also in the office of the city clerk a statement in writing, signed by such person or his attorney, giving the name of the person to whom such cause of action has accrued, the name and residence of the person injured, the date and about the hour of the accident, place where the accident occurred, "and the name and address of the attending physician (if any.)" The notice was served on the proper city officials on December 10th, 1934, and gave the name of the attending physician as Dr. Test and his office address. Counsel for defendant say, "The only question raised here against the sufficiency of the statutory notice is, that said

notice did not contain the name and address of the physician who attended plaintiff's injuries during the first 24 days immediately following the injury *** but only contained the name and address of the physician who took up the treatment of plaintiff's injuries where the first attending physicians left off;" and further, that the fact that defendant City may not have been misled "by reason of the omission of the name and address of the attending physician during the first twenty-four days of plaintiff's illness from the notice, does not cure the defect," citing Guimette v. City of Chicago, 242 Ill. 501; Minnis v. Friend, 360 Ill. 323.

In the Guimette case the notice served stated that the accident occurred on November 10th, whereas the uncontradicted proof showed it occurred October 10th, and it was held that the notice was insufficient. In the Minnis case the notice was not signed by the injured person or his attorney, - it was not signed at all, and it was held this was not a compliance with the statute.

The purpose of the notice is not only to enable the City to investigate intelligently the alleged claim, but that it may also prepare its defense. In Schmidt v. City of Chicago, 284 Ill. App., the court said (p. 533): "While it has been repeatedly held that the notice is mandatory and a condition precedent to recovery and that it must specify 'the name and address of the person injured, the date and about the hour of the accident, the place or location where the accident occurred, and the name and address of the attending physician (if any)' it has also been held that 'it was not intended that such a notice should serve to entrap the plaintiff who had a meritorious cause of action if it was sufficiently definite.' (Reule v. City of Chicago, 268 Ill. App. 266)", citing McComb v. City of Chicago, 263 Ill. 510.

In the Reule case, in discussing the sufficiency of the notice, the court said (p. 268): "Moreover, it has been held that

the designation 'at or near the corner of' is sufficient under the statute. It was not intended that such a notice should serve to entrap the plaintiff who had a meritorious cause of action if it was sufficiently definite to give the City notice as to where the accident happened. McComb v. City of Chicago, 263 Ill. 510." See also Graham v. City of Chicago, 260 Ill. App. 590.

In the instant case plaintiff in her notice named the physician who commenced to treat her just a month after the accident and who was her physician at the time the notice was given. We think this was a compliance with the statute.

Defendant also contends that, "Because of improper and prejudicial statements of plaintiff's counsel in his argument to the jury, not based on the evidence," the judgment should be reversed and the cause remanded for a new trial; that the court erroneously limited defendant's counsel in his argument to the jury concerning X-ray pictures taken of plaintiff's arm.

The evidence shows that prior to the trial plaintiff stipulated that the defendant might make an examination of plaintiff's arm for the purpose of settling the case, and it was mutually agreed that any X-ray or other evidence obtained by this examination would not be used on the trial. When the fact of the stipulation was brought to the attention of the court, the Judge and counsel went into chambers and the court held that a further examination would not be permitted in view of the stipulation. When defendant's counsel was arguing the case to the jury he said, among other things, "You can see from all the evidence that there is something fishy,

something phoney about this case." While making this, plaintiff's counsel in his closing argument said, "Did you notice how quick he (defendant's counsel) tried to pull off by showing him (Dr. Best) some phoney x-rays and asking him to read them?" Defendant's counsel objected to the court saw that the evidence about such x-ray pictures had been stricken and the objection was sustained. While we think the remarks of plaintiff's counsel just quoted was unwarranted, yet we are of opinion that since the court sustained objection to it, and since the question at most could go only to the extent of plaintiff's injuries, and since no complaint is made that the judgment is excessive, we would be wholly unwarranted in disturbing the judgment.

The judgment of the Superior Court of Cook County is affirmed.

JOHN M. ARTHUR.

McCurdy and Matchett, JJ., concur.

39620

CHICAGO TITLE AND TRUST COMPANY, a Corporation, as Trustee,
Appellee,

vs.

ADOLPH COHEN et al.

MARK L. LANDEKER,
Appellant.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

293 I.A. 625

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

By this appeal Mark L. Landeker seeks to reverse an order of the Superior court of Cook county cancelling and marking paid certain bonds claimed to be owned by him.

July 12, 1932, plaintiff, the Chicago Title and Trust Company, as trustee, filed its bill to foreclose a trust deed on certain premises in Chicago, given to secure an indebtedness of which there was more than $100,000 remaining due and unpaid. On October 17, 1932, while the foreclosure suit was pending, defendant Adolph Cohen purchased 40 bonds of the face value of $500 each, aggregating $20,000, for $5000, and claims that he made the purchase for Mark L. Landeker. April 30, 1934, a decree of foreclosure was entered finding the amount due on the outstanding bonds, including the $20,000 above mentioned, and all of the bonds were held to be on a parity and entitled as such to participate in the proceeds of the sale. The sale not having been had as ordered by the decree, Mark L. Landeker on May 28, 1936, by leave of court filed his intervening petition alleging that he owned the 40 bonds of the par value of $20,000, and praying that the property be sold in accordance with the terms of the decree. An order was entered accordingly and the property sold July 7, 1936, for $30,000, and August 12, 1936, the master filed his report of sale in which he showed, inter alia, that after making

certain deductions from the purchase price, there was $24,123.57 to be distributed to the owners of the bonds. The approval of the master's report of sale was continued from time to time, and February 11, 1937, an order was entered approving it. On the same day another order was entered giving complainant leave to file instanter its petition in which it prayed that an order be entered fixing the priorities of the various outstanding and unpaid bonds and setting up on information and belief that the purchaser at the sale made his bid as nominee of and for certain bondholders, and that the purchaser would apply all unpaid bonds held by him on account of the price he bid; that defendant Adolph Cohen is the record owner of the title to the premises and was such owner at the time of the filing of the bill. And on information and belief it was alleged that he owned the 40 bonds of the par value of $20,000, having purchased them after maturity from the owner, the George R. Meyercord Company, a corporation, and that since Cohen was the owner of the equity and of the 40 bonds, there was a merger and the bonds should be marked, "Paid and cancelled," or the payment of them should be subordinated to the lien of the other bonds.

Landeker filed his answer to the petition, alleging that Cohen purchased the bonds from the Meyercord Company for Landeker and therefore there was no merger and the bonds should not be marked "Paid and cancelled," and claiming that the bonds should be held to be on a parity with the other bonds, as provided in the decree. On the issue made by complainant's petition and Landeker's answer, the court heard the evidence and on April 23, 1937, entered an order or decree which recited that the matter came on for hearing on plaintiff's petition, which had been taken as confessed by defendant Adolph Cohen, and on the answer of Landeker; that the court heard the testimony and found that the property had been sold to a nominee of certain bondholders; that defendant Cohen was continuously the

owner of the title to the premises being foreclosed from prior to the filing of the bill, and is still such owner; that prior to the filing of the bill the Meyercord Company owned the 40 bonds of the par value of $20,000, and after the filing of the bill that company sold them to defendant Adolph Cohen, who paid for them and received them from the Meyercord Company. And it was decreed that the $20,000 worth of bonds had been paid, and the payment was no longer secured by the trust deed in foreclosure and that Cohen or Landeker within 25 days deliver the bonds to the Master so that they might be marked "Paid and cancelled;" that no part of the proceeds of the sale be distributed on account of such bonds. It is from this order that Landeker prosecutes this appeal.

Landeker contends (1) that the bonds in question were purchased for him by Adolph Cohen; that he is a stranger to the title and should have his bonds paid ratably with all the other bonds from the proceeds of the sale; (2) that if the court finds that Cohen bought the bonds for himself, he should share ratably in the proceeds of the sale with all the other bonds because Cohen was not personally liable for the payment of the bonds, and that since they were defaulted in payment before he purchased them, the title to the real estate, after the default, vested in the trustee and that he, as former owner of the equity, had no right, title or interest in the property save the statutory right of redemption upon payment of the amount bid at the sale.

(1) Whether Cohen purchased the bonds for himself or for Landeker was a question of fact. The chancellor heard the evidence, found that Cohen purchased the bonds for himself, and not for Landeker, and unless we are able to say that the finding is against the manifest weight of the evidence we are not authorized, under the law, in holding that the court erred.

A. O. Johnson, treasurer of the Meyercord Company, called

by the Chicago Title and Trust Company (the petitioner), testified that his company was the original owner of the 40 bonds, having purchased them from the State Bank of Chicago; that in October, 1932, they were sold and delivered to Adolph Cohen; that Cohen paid for them with a cashier's check for $5000, being 25% of the face of the bonds. On cross-examination he testified he understood Cohen was buying them for someone else - that Cohen told him he was buying the bonds for someone else but did not mention the person's name. Thereupon counsel for the petitioner asked to call Mr. Cohen as an adverse witness under section 60 of the Civil Practice act. This was objected to by counsel for Landeker on the ground that Cohen "is not a party to this particular law suit in this hearing here." The objection was overruled and Cohen was examined under section 60 by counsel for petitioner. He testified that he was the owner of the equity of redemption of the property in foreclosure. The petitioner then offered in evidence a receipt which Cohen testified bore his signature. It is dated October 17, 1932, and recites that the Meyercord company received a cashier's check for $5000 from Adolph Cohen in payment of the bonds, at the bottom of which appears, "Received the above mentioned bonds. Adolph Cohen." Cohen was then called as a witness for Landeker and testified that he bought the bonds in question from the Meyercord company, having called at the office of that company in response to a letter; that Mr. Johnson, the witness who had just testified, asked Cohen if he was the owner of the garage on Broadway (being the property in foreclosure); that he replied he was, and Johnson stated they had $20,000 worth of bonds secured by a mortgage on the property they would like to sell; that the witness said he didn't have that much money but would look around and see if he could get a customer, "Mr. Landeker is a man who worked forty years with my brother. He

never saved a dime. He made good wages;" (this, on motion of counsel for petitioner, was stricken;) that after he talked to Landeker he went back to the Meyercord company and told Mr. Johnson that he had somebody in mind who could probably pay 25 cents on the dollar for the bonds; that Johnson said they would have a meeting of the company and pass on the matter and let him know later; that he afterward received a letter and again went to the Meyercord company and was advised that that company had decided to accept his offer of 25 cents on the dollar; that afterward the witness saw Landeker and said to him, "You can get it for twenty-five cents. I advise you to buy it; it is a good buy." On objection this was was stricken. The witness further testified that he paid the $5000 for the bonds with his own money; borrowed $3000 from the bank - sixty days' time - and stated the bonds belonged to Landeker (which was stricken). "The Witness: A. It is all paid for at this time--- The Court: Objection sustained. The Witness: A. (cont'd) - he paid it back, every dollar. *** Q. He paid you back, every dollar? A. Yes, every dollar." Counsel for petitioner then said he wanted the record to show that Adolph Cohen is the owner of the equity but not the maker of the bonds, and this was agreed to; that Cohen received title to the property from the mortgagors by a quit claim deed. This is all the evidence on the question of the ownership of the bonds and we are of opinion we would not be warranted in disturbing the finding of the chancellor that the bonds were bought and owned by Cohen.

We think what was said in Hester v. Frary, 99 Ill. App. 51-54, is pertinent here. The court there said: "Nor can we say that the evidence is such that the court could reach no other conclusion of fact, but that McNett bought the note as agent of appellee. Aside from the fact that McNett apparently dealt with Chandler & Co. in his own behalf in buying the note, for which he

paid by his own check, there is no direct evidence that he made the purchase in his own right. McNett and Fury, the appellee, both testify that the purchase was made for the latter by McNett, acting as agent. But this testimony, although not directly contradicted, is not of necessity conclusive. If court or jury viewed it as inherently improbable, it might be rejected, although not directly contradicted by the testimony of witnesses. ***

"The testimony in question is to the effect that McNett, acting as the agent of appellee, bought this paper for the latter as an investment. But when the purchase was made appellee had no knowledge of this paper, nor did he have funds in the hands of McNett sufficient to buy the paper. As an investment it was of doubtful value, for the note, when bought by McNett, had only two days to run until its maturity. McNett had an apparent motive, as owner of the real estate mortgaged, in purchasing the note. It is difficult to discover any adequate motive which might prompt appellee to buy the note." So, in the instant case, there seems to be little reason why Landeker would buy the bonds as an investment while the foreclosure suit was pending. But Cohen had a motive. He was the owner of the property. He was paying off part of the mortgage at twenty-five cents on the dollar. In these circumstances, we think it clear we would not be warranted in disturbing the finding of the chancellor, who saw and heard the witnesses testify, on the ground that his finding is against the manifest weight of the evidence.

(2) Counsel for Landeker next contend that, assuming that Cohen purchased the bonds, he having done so after their maturity and after foreclosure proceedings had been instituted, is nevertheless entitled to share in the proceeds of the sale on a parity with the other bondholders. In support of this it is said: "The

rights of the parties are governed by the terms of the Trust Deed and there is no prohibition in this Trust Deed preventing a former owner of the premises who is not liable personally on this indebtedness from purchasing, after maturity of the debt, bonds secured by the Trust Deed." The difficulty with this contention is that Cohen was not "a former owner of the premises" but was the present owner. Counsel cites Rohrer v. Deatherage, 336 Ill. 450, to support his contention that in Illinois a mortgagor is the legal owner of the mortgaged premises against all persons except the mortgagee but his title is only a qualified one as security for the payment of the debt. But after condition broken, the mortgagee is, as between him and the mortgagor, the owner of the fee. While language is sometimes used in the opinions that would seem to sustain counsel's contention, it is found upon careful analysis to be not so. After condition broken, the mortgagee is not the owner in fee simple, but "'The fee title held by the mortgagee is in the nature of a base or determinable fee. The term of its existence is measured by that of the mortgage debt. When the latter is paid or becomes barred by the Statute of Limitations the mortgagee's title is extinguished by the operation of law ***. Until it is extinguished the legal title is in the mortgagee for the purpose of obtaining satisfaction of his debt.' Ware v. Schintz, 190 Ill. 189; Lightcap v. Bradley, 186 Ill., 510." We quoted the above in Wolkenstein v. Slonin, 270 Ill. App. 473, where we went into the question rather fully.

Cohen being the owner of the premises and having paid off part of the mortgage debt, whether there has been a merger we think depends upon the equities of the situation. There were no rights that might intervene, such as judgment creditors, etc., and we think in this situation there is no equity that would prevent a merger. Hester v. Frary, 99 Ill. App. 51; Lilly v. Palmer, 51 Ill. 331;

Forthman v. Dieters, 206 Ill. 159; Maulding v. Sims, 215 Ill. App. 473; Grossman v. Lipschitz, 261 Ill. App. 523; Tabero v. Chutkowski, 286 Ill. App. 225. Whether a merger results from a greater and lesser estate uniting in the same person depends upon what will best subserve the purpose of justice and the intention of the parties. This is the general rule.

In Forthman v. Dieters, 206 Ill. 171, the court said (p. 171): "It is well settled that, at law, when a greater or lesser, or a legal and equitable estate, coincide in the same person, the lesser, or the equitable estate, is immediately merged and annihilated. *** It is true that the question, whether or not a merger takes place in equity, depends upon the intention of the parties, and a variety of other circumstances. *** But, 'a merger will be prevented by equity only, however, for the purpose of promoting substantial justice.'" Under the authorities we hold there was a merger.

The order of the Superior court of Cook county appealed from is affirmed.

ORDER AFFIRMED.

McSurely and Matchett, JJ., concur.

39712

In Re ESTATE OF ANDREW LEONARD JOHNSON, Deceased.

HELEN W. JOHNSON,
Appellant,

vs.

JOSEPH O. GRANT,
Appellee.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

293 I.A. 625

MR. PRESIDING JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 18, 1936, Helen W. Johnson and Julius M. Johnson, residuary beneficiaries under the last will and testament of Andrew Leonard Johnson, deceased, filed their petition in the Probate court of Cook county to expunge an order of that court entered April 2, 1936. Joseph O. Grant, the executor, filed an answer, and after hearing the court on January 15, 1937, entered an order denying the prayer of the petition. An appeal was taken to the Circuit court by Helen W. Johnson, where the matter was heard de novo and an order entered June 8, 1937, dismissing the petition, and Helen W. Johnson prosecutes this appeal.

The record discloses that on May 20, 1929, which was a little more than a year after the probating of the will of Andrew Leonard Johnson, deceased, the executor filed his report in which he set up among other things that he had received as executor $207,696.71, and had disbursed all of this except $13,293.09, which he reserved for payment of the 1928 and 1929 personal property taxes, further costs, "executor's fees and attorney's fees," and prayed that his report and account be approved, and that an order be entered discharging him "upon accounting for the assets reserved;" that an allowance be made to him for his fees and those of his counsel, and that such other orders be entered as the court might deem necessary

or expedient. The account was dated March 30, 1929.

The heirs at law and beneficiaries, Helen W. Johnson, Julius K. Johnson and John V. Johnson, filed their appearance in the matter and consented to the approval of the account "and the de-termination of his fees and his attorney's fees by the Probate court of Cook County." December 5, 1929, the Probate court entered an order which recited that the executor had presented his final account; that more than a year had elapsed since the granting of letters, the entry of appearance and consent of all the heirs and residuary legatees; that all of the assets of the estate had been collected and all claims paid, and that the balance of the estate had been distributed according to the terms of the will; and it was ordered that the final account be approved and that the "executor is to be discharged upon producing vouchers for taxes."

Afterward the three heirs and residuary legatees filed their petition in the Probate court for a rule on the executor to distribute the balance of the moneys remaining in his hands. An answer was filed, the matter heard, and an order entered by Judge Carpenter February 24, 1932, in which he apparently held that he would award the executor a fee of $6772.56 and $7500 to his attorney. This order was entered by Judge Carpenter at his home in Belvidere after having heard the case in Cook county. The Johnsons objected to the order and December 14, 1932, it was vacated by Judge Nastel sitting in the Probate court of Cook county. The executor took an appeal to the Circuit court of Cook county, where the appeal was dismissed. A further appeal was prosecuted to this court, where the order of the Circuit court of Cook county was affirmed - In Re Est. of Johnson, 277 Ill. App. 319. The sole point was that the order could not stand because it was entered by Judge Carpenter at Belvidere, Illinois, outside of Cook county.

April 2, 1936, an order was entered by the Probate court of Cook county, Judge McEwen presiding, on the rule on the executor to show cause for failure to settle the estate. It was ordered that the rule be discharged. The order then recites that the matter came on for hearing on the objections of two of the Johnsons to the executor's final account (John V. Johnson having died leaving the other two Johnsons as his only heirs at law and next of kin); that the court heard the evidence and ordered that the executor be awarded $6800 and his attorney $7500 for their services. The order further recites that each of these fees, except $1558.79, has been paid from the $13,302.09. And each of the two Johnsons was ordered to refund one-half of the amount of the deficiency to satisfy the fees in full. Other objections to the account were overruled. The record further discloses that during the administration of the estate the executor distributed $50,066.83 to each of the three Johnsons, in accordance with the terms of the will.

November 18, 1936, the two Johnsons filed their petition praying that the order of April 2, 1936, be expunged and held for naught, and that the executor be found in contempt of court for failure to distribute to them the balance of the estate. The executor filed his answer, the matter was heard, and it was ordered that the prayer of the petition be denied. An appeal was taken by Helen W. Johnson to the Circuit court where the court heard the evidence and June 8, 1937, entered an order dismissing the appeal; the appeal to this court followed. The record is confused. There appear to have been a number of other proceedings in the matter, but we think it unnecessary to refer to them here.

On this appeal of Helen W. Johnson her counsel contends that the order entered by the Probate court December 5, 1929, by which the executor's final account was approved and he was discharged, was final, conclusive and binding upon all the parties; and as we under-

stand it, the argument is that nowhere does the executor claim there was any fraud, accident or inadvertence in the entering of such order, therefore the court was without jurisdiction, after the passage of the term at which the order was entered, to change or modify the order of that date. The difficulty with this contention is that it overlooks the facts in the case. The executor's report, which was before the court on December 5th, after stating what he had done in the administration of the estate, set up that he reserved for payment of the 1928 and 1929 personal property taxes, further court costs and for "executor's fees and attorney's fees" $13,293.09, and the prayer was that his account be examined and approved and that an order be entered discharging him as executor, "upon accounting for the assets reserved, that an allowance be made to the undersigned for his fees and for his counsel's fees," and that such other orders be entered as might be deemed expedient and necessary. The order of the court approved the account and report but we think it clear that the estate was still pending; the $13,293.09 remained in the executor's hands and his fees and the fees of his attorney hadnot been settled, therefore the court was authorized in entering such orders as the situation required to settle and dispose of those matters.

After the entry of the order of December 5, 1929, a number of steps were taken. The fees of the executor and his attorney were fixed by Judge Carpenter, sitting in the Probate court of Cook county, at about the same amounts that were afterward fixed by Judge Scanlan and which were approved by the Circuit court of Cook county. In other words, three Judges have passed on the amount of these fees. We do not have before us the evidence which was the basis for such allowances. It is not preserved in the record, and no argument is made that the services performed did not warrant the fees awarded.

The question of reasonableness is in no way involved on this appeal, nor is it urged that the amount of the fees is excessive.

Counsel for Helen W. Johnson further contends that the court was without power to order the two Johnson heirs to refund $1558.79 to make up the deficiency before mentioned. The argument is that Sec. 118, chap. 3, Ill. Rev. Stats. 1937, authorizes the refunding of part of the distributive shares or legacies for the payment of debts of the estate only, and counsel say, "it is very clear the deficiency was not to pay debts" because (1) the executor in his sworn report, approved December 5, 1929, alleged "all debts paid," and he was therefore estopped to afterward say there were debts at that time unpaid; and (2) that executor's and attorney's fees are not "debts" within the meaning of the statute. We are unable to agree with these contentions. What we have heretofore said we think is sufficient to show that all debts accrued and accruing against the estate were not shown by the order of December 5, 1929, to have been paid. We think executor's and attorney's fees are within the purview of the section of the statute, for it is as necessary to pay the executor and the attorney of an estate as it is to pay other bills due and owing. Here the executor had paid to each of the three legatees more than $50,000, and when he came to close up the estate it was found there was a deficiency of $1558.79.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely and Matchett, JJ., concur.

39742

PEOPLE OF THE STATE OF ILLINOIS,)
Defendant in Error,)
vs.) ERROR TO MUNICIPAL COURT
) OF CHICAGO.
BEN STEIN,)
Plaintiff in Error.)

293 I.A. 625

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

July 13, 1937, an order was entered by the Municipal court of Chicago finding Ben Stein guilty of a direct contempt of court and adjudging that he be committed to the common jail of Cook county for a term of 60 days or until otherwise discharged according to law. The case is brought before us by Ben Stein, who contends that the order is insufficient and void because it does not affirmatively show that he was present in court when the order was entered; and further, that the order is void because it fails to show the materiality of the alleged false testimony given by Stein for which he was adjudged to be in contempt of court. No brief has been filed on behalf of The People.

By the order before us the court found that Stein was guilty of a direct contempt of court because on "to-wit, May 1, 1937" after being duly sworn in open court in a cause then pending and on trial before Judge Hayes of the Municipal court, he testified to the effect that the signatures on certain documents in evidence were the true and genuine signatures of Albert Waldeman, plaintiff in a case then on hearing, and that the trial of that case was then continued to July 13, 1937, when it again came on for further hearing. Stein was called as a rebuttal witness on behalf of plaintiff in that case and then testified that the "testimony given by him on May 1st, 1937, was given without knowledge of its truth or falsity"; that he did not know the signature of Waldman.

In People v. Bain, 268 Ill. App. 192, we had before us the sufficiency of an order committing Bain to jail for ten days for a direct contempt of court based upon false testimony given by him as a witness in a cause on hearing. We held the order was fatally defective because it did not affirmatively show that Bain was present in court when the order was presented. We further held that the order was void for the reason that it failed to set forth facts showing that the false testimony was material in the cause in which it was given. We there said (p. 194): "The order is fatally vulnerable in two respects. It does not affirmatively show that Robert A. Bain was present in court when the order was entered. That this is necessary has been repeatedly held," citing authorities from this court and from the Supreme court, and that in such a proceeding the contempt was criminal in its nature and that no presumption of law obtains but that the facts must affirmatively appear in the order. Continuing we there said (p. 195): "The presence of the alleged contemnor cannot be inferred but must be s own affirmatively by the record." (citing a number of authorities.) "The second reason for holding the order void is that no facts appear therein from which we can determine whether the alleged false testimony was material to the issues heard. The order must set forth the facts so fully and certainly as to show that the contempt was actually committed. People v. Hogan, 256 Ill. 496; People v. Rockola, 346 Ill. 27. The assertion in the order that it was material to ascertain what financial interest Robert A. Bain had in the South Side Agency & Loan Corporation is merely a conclusion and does not show that this inquiry was material." We there held the order void and it was reversed.

For the reasons stated we hold that the order of the Municipal court of Chicago is void and it is therefore reversed.

ORDER REVERSED.

McSurely and Matchett, JJ., concur.

39626

ANNA R. LESLIE,
Appellant,

vs.

A. R. E. WYANT and LOUISE H. WYANT,
Appellees.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

293 I.A. 626

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing her complaint for want of equity.

Plaintiff filed her complaint alleging that she was the owner of real estate at 9419 S. Wabash avenue, Chicago, on May 20, 1929; that on May 29, 1929, a contract was entered into with Anna M. Emanuelson to construct a bungalow on this lot for $6500, and plaintiff was to convey the title to Anna M. Emanuelson to enable her to secure a mortgage loan of $3000; that Anna M. Emanuelson subsequently conveyed the premises to the defendants; plaintiff alleged that her conveyance was without consideration and was in the nature of a mortgage; that defendants are attempting to gain possession of the premises; she asked that the contract be set aside, that defendants be restrained from ousting plaintiff from possession and that the deed be declared a mortgage and that plaintiff have general relief. Answer was filed, reference was to a master who took evidence and reported, recommending that the complaint be dismissed for want of equity, objections and exceptions were overruled and a decree was accordingly entered dismissing the complaint, and plaintiff appeals.

From the master's report it appears that plaintiff owned a vacant lot at 9419 S. Wabash avenue, and on May 29, 1929, entered into what is called a preliminary contract with Emanuel Emanuelson. This document, with a number of other documents which the record

shows were introduced in evidence and which the master certifies were marked as exhibits and returned with his report, are not in the report of the master or attached thereto, so we must assume the correctness of the master's report as to matters of fact.

The master found that the so-called preliminary agreement of May 29, 1929, provided for the erection of a house by Emanuelson on the lot, and plaintiff agreed to convey this to him; the house was to cost $6500, for which plaintiff was to pay $500 cash and assume an encumbrance of $3000 which Emanuelson was to procure, then pay the balance in monthly installments of $60 or more. Also, on the same day, May 29, 1929, plaintiff and her husband by warranty deed conveyed the premises to Anna M. Emanuelson. The master found that the deed contained no recital that it was intended to have any other effect than an absolute conveyance of title.

June 10, 1929, plaintiff entered into a written contract for a warranty deed with Anna M. Emanuelson, wherein plaintiff covenanted and agreed to pay her $6500 - $500 in cash, assume an incumbrance of $3000, and the balance in monthly payments of $60 each; also, plaintiff was to pay taxes and assessments , and if plaintiff made these payments Anna M. Emanuelson agreed to convey to plaintiff the premises by warranty deed; in case of the failure of plaintiff to make any of the payments or perform any of the covenants the contract should, at the option of Anna M. Emanuelson be forfeited and determined and all payments made by plaintiff should be retained by Anna M. Emanuelson in full satisfaction of and in liquidation of all damages, and that she should have the right to re-enter and take possession of the premises. The master found that the contract did not contain any provision indicating that any valuation of the lot of land should be deducted from the purchase price or should be applied as a part payment.

June 11, 1929, Anna L. Emanuelson, a widow, conveyed and warranted to defendants as joint tenants the premises, subject to an incumbrance of $3000, which deed was filed for record. On or about June 24, 1929, Anna Emanuelson assigned to defendants all of her right, title and interest in and to the property described in and covered by the contract for warranty deed dated June 10, 1929. This assignment recited that the amount unpaid by plaintiff was $6000, and the next payment would be due August 1, 1929. June 15, 1929, the Chicago Title & Trust Company issued to defendants its owner's title guaranty policy guaranteeing that title was held by defendants in fee simple, in joint tenancy, subject to a trust deed dated June 4, 1929, duly recorded, made by Anna L. Emanuelson to secure her note for $3000.

The master found that plaintiff entered into possession of the premises under her contract for a warranty deed of June 10, 1929, and occupied it as a residence; that she made payments, pursuant to the contract, to defendants; that the first of the payments was made September 23, 1929, and the last July 28, 1934. Defendants paid $144 for the general taxes of 1930, $204.59 for special assessments payable in 1931, all of which were assessed against the real estate and not paid by plaintiff as required by her contract. Defendants also assumed the unpaid balance of $264.99, a debt incurred by plaintiff and her husband for a garage and sidewalk on the premises. The master found that the defendants have properly applied all the money received by them from the plaintiff; that no payments have been made in pursuance of the purchase contract since July 28, 1934, and that plaintiff has made default in the general taxes assessed for the years 1931, 1932 and 1933.

March 1, 1935, defendants served a written notice on plaintiff that she was in default in her payments and that there was then due under the terms of the contract $1494.93, and that unless this

was paid within 31 days the contract would be declared forfeited and determined and all payments theretofore made by plaintiff would be retained as liquidated damages. April 1, 1935, a similar notice was served by defendants on plaintiff, notifying her that by reason of her defaults in payments defendants had elected to terminate the contract, that it had been forfeited and determined and all payments had been forfeited.

Subsequently a suit in forcible entry and detainer was commenced by defendants against plaintiff and on June 4, 1935, judgment for possession was entered against her and in favor of defendants.

The master found also that defendants had acquired their title to the real estate and their title as assignees of the contract of purchase of June 10, 1929, without any knowledge or notice that the warranty deed dated May 29, 1929, from plaintiff and her husband to Anna M. Emanuelson was intended to have any other or different effect than that of an absolute conveyance in fee simple of the title to the real estate described; that they had no knowledge or notice of any claim of plaintiff that the warranty deed was intended to be a mortgage to secure the payments for the building to be erected on the lot. The master concluded that plaintiff was not entitled to have the warranty deed declared or adjudged to be a mortgage as against the right, title and interest of the defendants in and to the real estate and the purchase contract of June 10, 1929.

The master found that plaintiff was not entitled to the relief sought and recommended that the complaint be dismissed for want of equity. The decree followed the recommendation.

It is somewhat difficult to follow plaintiff's argument as presented in her brief. She first makes arguments on alleged errors in the master's report with reference to his findings concerning

the documents introduced in evidence. As we have already said, we do not find these documents in the record. We must therefore assume the correctness of the findings of the master.

Plaintiff stated in her warranty deed that she conveyed, free of incumbrances and for a consideration, to Anna M. Emanuelson. Having stated a certain thing to be true she is estopped to deny it at any time thereafter. Biwer v. Martin, 294 Ill. 488.

Defendants took their warranty deed and the assignment of June 24, 1929, of Anna M. Emanuelson to them of her interest in the property, which assignment recited the amounts which plaintiff should pay to entitle her to a warranty deed; they had no knowledge of any claim by her except the right to a deed when all of the payments were made and her convenants in the contract were performed. Defendant Mr. Wyant testified that he never had any knowledge of any bargain between plaintiff and Mrs. Emanuelson in which plaintiff was to be paid any money. The master found that the contract contained no provision indicating that the value of the lot should be deducted from the purchase price or should be applied as part payment. Secret understandings will not bind a purchaser who pays value in ignorance of any such understandings. Bigelow on Estoppel, page 477. When writings show a complete obligation without uncertainty or ambiguity it is conclusively presumed that they contain the whole agreement of the parties.

Plaintiff says the judgment in the forcible detainer proceeding is void because plaintiffs in that case (defendants here) did not allege in their complaint how they acquired title, as required by section 22 of the Practice act. The judgment in the forcible detainer case was rendered in the Municipal court and no appeal was taken from the judgment. Moreover, it is elementary that the question of title cannot be adjudicated in a forcible detainer action. Section 22 does not apply.

Even if it should be admitted that the contracts and conveyances to plaintiff were in the nature of a mortgage, plaintiff does not offer to pay the balance due under her contract. Seeking equity she should offer to do equity. No proof was offered which would justify granting the relief plaintiff seeks.

The decree dismissing the complaint for want of equity is affirmed.

AFFIRMED.

O'Connor, P. J., and Hatchett, J., concur.

39635

JAN BLAHA,
Appellee,

vs.

MATTHEW J. TURK,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

295 I.A. 226

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an order denying his motion, made after term, to vacate an adverse judgment of $800.

The suit is to recover damages for personal injuries, plaintiff alleging that defendant negligently operated his automobile, striking plaintiff and injuring him. June 16, 1934, by agreement the case was stricken from the trial call. July 6, 1936, the Superior court entered an order for the clerk to prepare a special calendar of old cases not yet terminated; pursuant to this a calendar was prepared which includes the instant case; it is calendar No. 161 on page 133.

When the case was reached for trial defendant says neither he nor his attorney was present, and in his brief he says the judgment was entered by default. This is not accurate. The record recites the cause was called for trial and the parties to the suit came, by their attorneys respectively, that it was heard by the court without a jury, and after hearing all the evidence defendant was found guilty and plaintiff's damages were assessed in the sum of $800; this judgment was entered January 28, 1937, and the motion to vacate and set aside the judgment was made March 29, 1937, more than thirty days after the judgment was entered.

In his motion defendant asserted that in September, 1936, he sent his secretary to the office of the clerk of the Superior court to ascertain the status of the case; that she made inquiry of the chief clerk of the office as to the case and was told by him

that nothing further would or could be done therein until written notice was served upon defendant's attorney; that she reported this to defendant's attorney and he relied upon it.

It is argued that this was an error or misprision of the clerk which is ground for a motion to vacate a judgment, and that the error of a clerk which misleads an attorney as to the status of his case warrants relief, citing Toth v. Phillipson & Co., 250 Ill. App. 247. In that case it was held that the mistake of fact was in dismissing the suit on the supposition that the plaintiff had not appeared for trial, while in fact he had, which fact was unknown to the court when the order of dismissal was entered. Aaron v. Jefferson Ice Co., 129 Ill. App. 570, involved a mistake of the clerk in printing in the trial calendar the name of the case involved with wrong names, which misled the attorney who was watching the calendar.

Here the calendar including the instant case was prepared under order of court, pursuant to the well known practice in this county where such calendars are prepared for the purpose of clearing the docket of old and dormant cases. The order recited that copies of the calendar would be available to the members of the Bar not later than August 24, 1936. If the attorney for defendant had examined this calendar he would have seen his case listed there and subject to call. He should not have relied upon the uncertain report of his secretary that some clerk in the Superior court had told her nothing further would be done without notice to the defendant. Apparently this interview with the clerk was after the printing and issuance of the calendar of dormant cases. If the attorney had gotten a copy of the calendar and had read the rule printed therein, he would have known that his case would be called for trial in due time and that if he did not appear it would be heard.

In Carroll, Schendorf & Boenicke, Inc. v. Hastings, 259 Ill. App.

564, this court affirmed the trial court in denying a motion to vacate a judgment, and the opinion shows in detail circumstances very similar to those in the instant case.

It is well established that negligence of a defendant or his attorney, resulting in the entry of a judgment, will bar relief under section 72 of the Civil Practice act, which provides for the motion in the nature of a writ of error coram nobis. Gburek v. Kuss, 225 Ill. App. 346; Imbrie v. Bear, 230 Ill. App. 155; Gaines v. Chicago Rys. Co., 255 Ill. App. 3[illegible].

We hold that the facts stated in the petition to vacate were not sufficient and the trial court properly overruled the motion. The order is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39660

VERON BUILDING CORPORATION, a Corporation,
Appellant,

vs.

HOMER S. WARREN,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

293 I.A. 626

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit alleging that defendant was a secret and dormant partner with his son, Homer S. Warren, Jr., in the occupancy of a room in plaintiff's building and liable for rent as one of the partners. On trial by the court without a jury the finding was for defendant and plaintiff appeals from the judgment.

Defendant is a physician, practicing in Chicago for many years; in December, 1932, his son, Dr. Homer S. Warren, Jr., became the lessee under a written lease of a room in a building at 1046 Wilson avenue in Chicago; the son was behind in his rent and on August 16, 1934, to settle these arrearages executed and delivered to plaintiff his promissory judgment note in the sum of $1300, with interest; January 29, 1935, judgment by confession was entered upon the note in favor of plaintiff and against the son, Homer S. Warren, Jr., for $1477.71.

Plaintiff's statement of claim alleged that on July 29, 1935, it discovered for the first time that defendant and his son were partners, engaged in the practice of medicine in the offices located on the premises; that therefore the note is a partnership liability and defendant liable thereon.

Plaintiff in his brief invokes the principle that a secret or dormant partner is liable for a debt incurred by an ostensible partner for the benefit of the partnership, to which defendant replies that the burden of proving the partnership was upon plaintiff,

(Furber v. Page, 143 Ill. 622) and that the evidence fails to prove this.

The evidence shows that both defendant and his son were duly licensed and practicing physicians, the son just commencing to practice, and defendant contributed substantial sums for the equipment of his son's office; defendant maintained his own personal bank account; he never paid his son's secretary or nurse, never agreed to pay rent nor the son's accounts; he never knew of any profits of his son's practice and never received any share of the receipts; he was not familiar with the monthly receipts and never knew where his son kept a bank account.

Apparently a citation was issued against Dr. Homer S. Warren, Jr., upon the judgment against him, at which time the defendant testified. A court reporter testified in the present case, reading from his notes transcribed in the citation proceedings. Defendant objected to this but the court admitted it. In these former proceedings defendant had testified, "Well, I should say I was part partner there," and to the question, "You were one of the partners with him there?" answered, "Yes"; that he thought he was to receive one-third of the profits there if they were earned, but that there were no profits. Other questions were put to him in which the existence of a partnership was assumed.

Defendant argues that this shows only that defendant was assisting his young son to get started in his profession and that the relationship cannot be construed as a partnership, making defendant liable for obligations incurred by the son. In Teed v. Parsons, 202 Ill. 455, the court said:

"In partnerships not commercial in their nature, such as those of lawyers, doctors and others, called 'non-trading', one partner cannot bind the other by the execution of promissory notes, unless authority is expressly given or recognized by all parties or implied from their general business habits. * * * The partners can only be bound upon proof of authority, and the burden of proof to establish such authority is upon the plaintiff. (Ulery v. Ginrich, 57 Ill. 531; Parsons on Partnership, 199, note.)"

In that case a witness testified that the association involved was in the nature of a partnership, but the court said: "but what will constitute a partnership is a question of law, and her conclusion as to the law did not establish the fact. *** One essential feature, which must always be present to constitute a partnership, is that it is formed for business purposes." We are of the opinion that the elements necessary to establish a partnership were lacking in the relationship between defendant and his son. He was merely assisting the young man in the commencement of the practice of his profession as a physician.

Plaintiff complains of a statement of the trial court when it ruled against the objection of defendant to the admission of the testimony of the court reporter as to what was said by defendant at the citation proceedings. The court ruled with plaintiff as to admissibility but added, "but I am not saying anything about the weight the testimony is entitled to." There is no proof that the trial court failed to give the testimony the weight to which it is entitled. There is no merit in plaintiff's point.

Upon the evidence adduced we hold that the trial court was correct in its findings, and the judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39679

JOE KAMINSKAS, et al., Appellees, vs. FRANK CEPAUSKIS et al., Appellees.	APPEAL FROM CIRCUIT COURT OF COOK COUNTY.
On the Appeal of GEORGE B. ARCHER, Appellant.	293 I. 626

MR. JUSTICE McSURLY DELIVERED THE OPINION OF THE COURT.

This is a companion opinion to No. 39678, in which an opinion is filed this day.

This case involves the claim of George B. Archer, holder of the second mortgage referred to in our opinion in that case. When the property was conveyed in December, 1928, to Cepauskis, it was subject not only to the first mortgage of $10,000 but to a second mortgage owned by defendant George B. Archer; in August, 1929, when there was a balance of $6500 due and in default, he agreed to cancel this second mortgage in exchange for new notes of $6500, secured by a new junior trust deed on the same property. As part of this transaction Frank Cepauskis signed and delivered an affidavit to induce Archer to accept in lieu of the old second mortgage new notes secured by trust deed; in this Cepauskis recited the purpose of the transaction; that the new mortgage was to take the place of the old; that the affiant was not married but was a bachelor. The sole consideration for the new mortgage was the cancellation of the old one. The transaction was merely a change in the form of the security, no new money consideration being given.

The master found that the Archer mortgage was merely a substitution for the old second mortgage and that he had a valid

lien subject to the lien of the first mortgage and superior to the dower right of Anna Cepauskis. The Chancellor sustained exceptions to this part of the decree and held that Archer's lien was subordinate to Anna Cepauskis' dower right.

For the reasons stated in our opinion in No. 39678, we hold that when Archer accepted a new mortgage in substitution for his old one, he did not lose his position of priority over the dower right of the defendant Anna Cepauskis. We therefore reverse the decree and remand the cause with directions to enter a decree in accordance with the Master's report, finding that as to the premises described in the second mortgage George E. Archer has a lien for the unpaid balance superior to the dower right of the defendant Anna Cepauskis.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, C. J., and Matchett, J., concur.

39709

FRED C. STRIGL,
Appellant,

vs.

CIRO PARDISE et al. GEORGE M. HARDING AND MARTIN H. KENNELLY, Trustees of Consumers Company, a Corporation,
Intervening Petitioners,
Appellees.

) APPEAL FROM
) CIRCUIT COURT
) OF COOK COUNTY.

251

293 I.A. 627

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This is a foreclosure proceeding in which a receiver ordered coal from Consumers Company for use on the premises involved; there was a balance of $183.75 due for this, which the court ordered plaintiff to pay, and also made it a lien on the premises. Plaintiff appeals from this order.

Plaintiff filed the complaint to foreclose. December 7, 1931, Hubert Rance was appointed receiver of the premises described in the complaint, with the usual powers of a receiver, to collect rents and to maintain the premises.

January 4, 1932, on petition of the receiver, the court entered an order authorizing him to purchase coal needed to heat the building; also electric light and water and to employ a janitor. October 6, 1932, decree of foreclosure was entered finding there was due plaintiff the sum of $20,735. No report of sale appears in the record but from an answer subsequently filed by plaintiff it appears that in March, 1933, he received a quit claim deed from the owners of the equity of redemption and took possession of the premises and has been in possession since that time.

August 25, 1933, the receiver filed his final account and report. It is in itemized form, showing the disbursements in detail. It shows a number of unpaid bills aggregating $531.82, among which are items of coal purchased from Consumers Company

aggregating $133.75. September 1st plaintiff filed his objections to the final report.

June 18, 1936, a stipulation was signed by the attorneys for the receiver and for plaintiff, wherein it was stipulated and agreed that the final report of the receiver filed August 25, 1933, "be and the same is hereby confirmed and approved in every respect." On the same day, June 18, 1936, an order was entered on this stipulation, confirming and approving the receiver's report, and he was discharged as receiver and his bond cancelled and surety discharged.

March 19, 1937, a petition was filed by the trustees of Consumers company alleging that Rance, as receiver, had purchased coal from petitioners for use and consumption in the heating of the premises in pursuance of an order of court; that the petitioners had sold and delivered the coal during the months of October and November, 1932, and there is now due for this the sum of $133.75; that the record in the case did not indicate that a sale had been had under the decree of foreclosure entered October 6, 1932; that the receiver's final account showed the indebtedness of $133.75 due Consumers Company and that it was unpaid, and the report and account was approved. The petitioners asked that the plaintiff be directed to pay this amount and that it be decreed to be a lien on the premises and the rents.

March 25, 1937, plaintiff filed an answer in which he alleged that the property had been sold under the foreclosure decree on November 2, 1932; that a master's certificate had been issued to plaintiff as the buyer and that there was a deficiency of $564.57 due plaintiff after the sale; that thereafter the owners of the equity of redemption conveyed to plaintiff this equity in satisfaction of the decree and that plaintiff has been in possession of

the premises since that time. The answer denied the jurisdiction of the court to enter any order except the order satisfying the decree of foreclosure, and denied that the court had jurisdiction to enter any order on the intervening petition.

May 14, 1937, after hearing the court entered an order setting forth the foregoing proceedings, finding that plaintiff has been in possession of the premises; that the receiver has no funds with which to pay the claims of the intervenors, and it was adjudged that plaintiff should pay the amount due them and they should have a lien upon the premises for this amount. Plaintiff appeals from this order.

Counsel for plaintiff have presented a mass of propositions and citations, far in excess of what is required to pass upon the question presented.

It is evident that when the receiver was discharged, June 18, 1936, no arrangements were made to discharge the debts incurred by the receiver in the maintenance of the property. Apparently it was intended to provide for these when the report of a sale was made. Contrary to the customary procedure, no report of sale was filed. Plaintiff having acquired the equity of redemption and possession of the premises did not see fit to file any report of sale. He now claims that the court had no jurisdiction to make him or the property liable for the unpaid bills of the receiver.

The petitioners were not parties to the original proceedings, and the decree of foreclosure entered could not bind them. When a decree is rendered in an equitable proceeding it does not terminate the jurisdiction of the court until all other undisposed of collateral matters are determined and settled. In the recent case of First Nat. Bank v. Bryn Mawr Beach Bldg. Corp., 365 Ill. 409, it was held that the court had jurisdiction, after decree, of a committee's plan of reorganization although the committee asked the court to assume such

jurisdiction almost a year after the entry of the decree, the opinion saying: "No one will contend that a decree for foreclosure is the last and only order or decree that can be made in such a proceeding." See also Totten v. Totten, 299 Ill. 43; Eggers v. Adler, 248 Ill. App. 113, 125; Baker v. Chicago Title & Trust Co., 250 Ill. App. 486, 491; Chicago Title & Trust Co. v. Waldman, 233 Ill. App. 21, 26.

Until the court confirmed the report of the foreclosure sale the court retained jurisdiction to carry out the terms of the decree. Levy v. Broadway-Carmen Bldg. Corp., 366 Ill. 279, 283; Shultz v. Milburn, 366 Ill. 400, 403. Plaintiff's answer to the petition alleges there was a sale and deficiency. The decree provided that upon the confirmation of the master's report of sale showing a deficiency a receiver of the premises would be continued. It is reasonable to assume that if the master's report had apprised the court of a deficiency the receiver would have been continued to collect the rents and apply the proceeds in payment of the obligations of the receiver and the deficiency.

The portion of the order appealed from ordering plaintiff to pay petitioners' claim and making it a lien on the premises is in accordance with the accepted practice in equitable proceedings. In Clark on Receivers (2d ed.), sec. 611(i), p. 390, the author states that where there is no fund out of which receivership expenses can be paid, it is the usual rule that the party at whose instance the receiver was appointed should be taxed with such costs, in the same manner as when a receiver is held to have been appointed without any probable cause. The cases cited support this statement. 23 R. C. L. 106, is to the same effect, stating that courts are vested with large discretion in determining who shall pay the cost of receivership, according to the justice and equities of each case. Knickerbocker v. McKindley Coal Co., 172 Ill. 535, is a case in point. There the McKindley Coal company furnished coal and groceries

to the receiver of a hotel property under foreclosure; the indebtedness of the receiver was incurred after the sale; the receiver was discharged and the Coal company filed an intervening petition seeking payment of the amounts due it. The court found the receiver had no funds to pay these and held the property itself was chargeable with the necessary expenses of the receivership. Counsel for the intervening petitioners assert what seems to be the fact, that the instant order appealed from follows the language of the order sustained in the Knickerbocker case.

Moreover, the stipulation of the parties approving and confirming the receiver's report is an admission of the truth of the facts contained in the report. As is said in Wigmore on Evidence, (2d ed.), vol. 5, sec. 2591, "A fact that is judicially admitted needs no evidence from the party benefiting by the admission."

Other points are made and cases are cited by counsel for plaintiff which are not controlling. Plaintiff received the rents from March, 1933, to June, 1936, when the receiver was discharged, aggregating a sum very much greater than the total of the unpaid receivership debts. Plaintiff failed to disclose, prior to his answer to the petition, that he had purchased the property at the foreclosure sale and the equity of redemption from the owners and had entered into possession and collected the rents. It is only just that he and the property should be taxed with the receiver's expenses, especially when the receiver was obtained by him in the first instance.

The judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39730

THE PEOPLE OF THE STATE OF ILLINOIS,
ex rel. ADAM BOCZKOWSKI, Relator,
for and in behalf of ALBERT BOCZKOWSKI,
Appellant,

vs.

STANLEY BOGDAN and MARY BOCZKOWSKI BOGDAN,
Appellees.

) APPEAL FROM CIRCUIT
) COURT OF COOK COUNTY.

293 I.A. 627

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment in habeas corpus proceedings involving the custody of a minor boy, Albert, ten years of age.

Adam Boczkowski filed his petition in habeas corpus alleging that he is the natural father of Albert; that the mother is dead; that Albert is unlawfully held and detained by defendants, and that petitioner is a fit and proper person to have the care and custody of the child and is ready and willing to take him into his home, which is comfortable and suited to his station in life. Defendants answered, charging that plaintiff is not a fit or proper person to have the custody of the child; that the county court of Cook county in adoption proceedings had awarded sole care and custody of the child to defendants, finding that plaintiff had wilfully abandoned and deserted him; that the County court entered its decree after a full hearing where all parties were present.

After hearing the evidence the Circuit court ordered the petition for habeas corpus dismissed, the child was remanded to the custody of defendants and the court further found that the decree for adoption entered in the County court was valid and in full force and effect. Plaintiff appeals from this order.

There is no controversy as to the law governing the right to the custody of the child. The right of a parent is superior to

the right of any other person if he is a fit person to have such custody and is so circumstanced that he can provide the necessaries of life and properly maintain and educate the child. This right is not an absolute one and it may be divested by the paramount right of the court, for good and sufficient cause. The father may by his conduct forfeit his right, by proof of facts to show that he is unfit to perform the duties or obligations resting upon him as a parent. Sullivan v. The People, 224 Ill. 468. The adoption statute is for the benefit of the child. McConnell v. McConnell, 345 Ill. 76, 78; Hoskins v. Clifford, 309 Ill. 363.

Did the evidence presented to the trial court justify the finding? The court not only considered the testimony and depositions of witnesses but also a report made by an investigator from the Cook County Bureau of Public Welfare, created under chap. 34, par. 67a, Ill. Rev. Stats. 1937. No objection was made to this upon the trial. The record shows that both parties consented to the court taking the report into consideration in determining the case. Hoover v. Empire Coal Co., 149 Ill. App. 258, 263; 3 Jones on Evidence (2d ed.), sec. 1078.

Albert was born to plaintiff's wife Agnes October 23, 1926, in Shamokin, Pa. Defendant Mary Bogdan is a sister of plaintiff, and the other defendant, Stanley Bogdan, is her husband. Albert's mother was very ill after his birth, and at her request defendants took care of him for a short period. Agnes Boczkowski died when the child was about thirteen months old, and before her death expressed the wish that defendants should take the child and raise him as their own. They did so, and he has been in their care ever since that time. He was eleven years of age on October 23, 1937, and has known no other parents or home than with defendants.

Defendants did not hear from plaintiff until more than a year after his wife's death. There was ample evidence that plain-

tiff was frequently drunk. A sister - not defendant Mary Bogdan,- testified that he would get drunk whenever he got a chance. He was also the father of an illegitimate child before he left Pennsylvania. After coming to Chicago he lived at the home of defendants intermittently for about four years and continued his drunken habits. He was on relief for more than a year and never manifested any interest in Albert and on one occasion when he was seriously ill was indifferent and refused to give him any care or medicine.

In February, 1935, plaintiff married a widow and about a year thereafter indicated a wish to have Albert come and live with them. In July, 1936, defendants filed a petition for the adoption of Albert in the County court of Cook county and plaintiff was duly served with summons, entered an appearance and filed an answer; after a contested hearing the court on February 19, 1937, entered a decree awarding the child to defendants.

March, 1937, the present petition for a writ of habeas corpus was filed. The evidence, including the report of the investigator for the County Bureau of Public Welfare, showed that defendant Stanley Bogdan has been steadily employed for more than eight years past, with an excellent record; that both he and his wife and also Albert are members of St. Hyacinth's church; that Albert has a nice room of his own in the home of defendants and all the clothing a child needs; he is apparently very fond of defendant Mr. Bogdan, whom he calls "Dad" and they are companions in sports. The Mother Superior of St. Hyacinth's school where Albert attends stated that he was regular in attendance and always comes to school looking neat and clean. The assistant pastor of the church states that he knows defendants well; that they are good, conscientious people and take very good care of Albert.

Able counsel for plaintiff has analyzed the stories of the respective witnesses in an attempt to show that the dissolute habits of plaintiff existed some years ago and that since his second marriage in 1935 he has been sober and industrious; that his present wife had ample means and they were able to give Albert a comfortable home. The evidence does not support this pleasing picture. For instance, plaintiff stated that he had worked for six months in the Schultz garage, earning $27.50 a week; inquiry at this place disclosed that he had been discharged after working there six weeks because he did not do the required amount of work; the manager of the garage also stated that plaintiff had requested him to say to anyone making inquiry that he was still with them. The evidence also showed that in the home of plaintiff there were only two bedrooms, one of them rented, and plaintiff's suggestion was that as he worked at night the boy could sleep with his wife. It also developed that plaintiff's present wife has some little property but would not be called a woman of wealth.

There was an impressive array of witnesses testifying to the comfortable circumstances of defendants in the home and that their treatment of Albert was as if he were their natural child. The trial court would have little difficulty, after considering the evidence adduced before him, in arriving at the conclusion that plaintiff had forfeited his right to custody of the child, whose best interest would be served by awarding him to defendants.

Plaintiff's counsel argues that the adoption decree of the County court was void on the ground that sections 2 and 3, chap. 4, Ill. Rev. Stats. 1937, prescribe that one ground for adoption must be abandonment of the child or desertion "for more than six (6) months next preceding the filing of the petition," and that neither the petition in the County court nor the decree of adoption

contain the words "six (6) months next preceding the filing of the petition." This is a captious criticism. The petition alleges that the child was about nine years and nine months of age when the petition was filed; that he was abandoned by his father when he was thirteen months old, and that the petitioners (defendants here) have had the sole care and custody of him since that time, for more than nine years last past. The decree finds that petitioners (defendants here) have had sole care and custody of the child since November, 1927. In McConnell v. McConnell, supra, the court quoted with approval from Hopkins v. Gifford, supra: "The right of adoption is not only beneficial to those immediately concerned but likewise to the public. It is not the duty of courts to bring the judicial microscope to bear upon such a case in order that every slight defect may be magnified so that a reason may be found for declaring invalid the proceedings under a beneficent statute of this character. Courts are more inclined to abandon the old rule of strict construction and to place a fair and reasonable construction on adoption statutes, to the end that the adoption may be upheld and the assumed relationship sustained. There must be a substantial compliance with the provisions of statutes conferring jurisdiction, but the construction of such statutes is not to be so narrow or technical as to defeat the intention of the act or the beneficial results where all material provisions of the statute have been complied with."

There were no errors upon the trial and the findings of the court are abundantly supported by the evidence. The order is affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39739

CITY OF EVANSTON, a Municipal Corporation,
Appellee,
vs.
[illegible],
Appellant.

APPEAL FROM [illegible] COURT OF [illegible].

27A

293 I.A. 627

MR. JUSTICE [illegible] DELIVERED THE OPINION OF THE COURT.

Defendant was found guilty of violating an ordinance of the City of Evanston prohibiting the sale of alcoholic liquors and was fined $200; he appeals. The only question involved is one of fact.

Florence Jones, who signed the complaint, testified that defendant ran a club at 1910 West Railroad avenue in Evanston, Illinois; that she went there on Sunday, November 15, 1936; that she was sober and began to play cards; several other people were present, including defendant; that she bought two pints of whiskey and several bottles of beer; that at about 11 o'clock she was drunk; she called her father who came over to the club and gave her money to pay what she owed in the card game; she stated that all who were playing cards were drinking.

Mr. Jones testified that he went to the club and found his daughter there under the influence of liquor and urged her to come home, which she refused to do.

Sergeant Hanky of the Evanston police department testified that on the night in question Florence Jones came to the police station at about 11:30 p. m. in a hopelessly intoxicated condition; she told him she had been thrown out of the club by defendant and her clothes were torn and she was badly bruised; she informed him and also two other police officers that she had spent the evening at the club conducted by defendant, had bought liquor there and became intoxicated as a result of drinking the liquor she had

purchased at the club. The two other police officers testified to the same effect.

As opposed to this two employees of defendant and two members of the club testified. Their testimony is in some respects contradictory. One employee, Doyle, testified that no one was drinking and that Florence Jones was not drunk, but that soft drinks were served to the members. One of the other witnesses testified that no refreshments were served on that evening. Another employee testified that Miss Jones appeared to have been drinking.

The trial apparently was had on December 1, 1936. The report of the proceedings is in narrative form and was approved by the trial Judge July 16, 1937. In his certificate the court refers to the long delay in presenting the transcript of the evidence and certifies that "many important facts testified to, have, of course, been overlooked;" that the court at the time of the trial did not believe some of the witnesses for the defense, and after seeing the witnesses testify the court was of the opinion that defendant was guilty of the charge. The certificate states that no record of the proceedings was made at the time of the trial.

Defendant's counsel argues that the court should not have considered the evidence of the police officers as it was hearsay. The record shows no objection was made to this upon the trial, hence it will be treated as competent. Hoover v. Empire Coal Co., 149 Ill. App. 258, 263; 3 Jones on Evidence, (2nd Ed.), sec. 1078.

The prosecution for the violation of an ordinance is a civil proceeding and a clear preponderance of the evidence must be shown in order to convict the defendant. The trial court, who saw the witnesses and heard them testify, is much better qualified to pass upon their credibility than is a court of review. We cannot say from the statement of facts presented by the record that the finding of the trial court is against the manifest weight of the

evidence. This is especially true when the certificate of the Judge states that the transcript does not contain all the evidence presented.

We see no good reason to disturb the conclusion of the court and its judgment is affirmed.

AFFIRMED.

O'Connor, P. J., and Latchett, J., concur.

39786

LEO DARACIUS, Administrator of the Estate of LEON DARACIUS, Deceased,
Appellee,

vs.

ALZBIETA KLIMOWICZ,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Suit was brought against defendant on a promissory note signed by her and her husband, Charles Klimowicz; upon trial plaintiff had a verdict for $1853, and defendant appeals from the judgment for this amount. Pending the action the original plaintiff, Leon Daracius died, and his son Leo, administrator of his estate, was substituted as plaintiff.

The note is dated July 1, 1921, in the amount of $1700, with interest at 4 per cent, payable on demand at the office of Charles Klimowicz & Son, 111 East 108th street, Chicago. Charles Klimowicz is dead and plaintiff seeks to recover against his widow, the defendant.

Plaintiff says defendant signed the note as an accommodation maker at the same time her husband signed it. Her defense is that she signed it some time after it had been executed by her husband and had been delivered to and accepted by the payee. She denies that she ever received any consideration for her signature, says the indebtedness was solely that of her husband, Charles, and that she is under no legal obligation to pay the note.

No brief has been filed in this court in support of plaintiff's judgment.

If defendant signed her name to the note after it had been made and delivered to take effect, and there was no new consideration for her undertaking, she is not liable. The original considera-

tion will not in such case be a consideration for her signing. Klein v. Currier, 14 Ill. 236, 238; Davis v. Smith, 29 Ill. App. 313; Good v. Martin, 95 U. S. 90, 94; 44 L.R.A. (N.S.) 482, Note, citing many Illinois cases. Charles Klimowicz in his lifetime was engaged in the real estate brokerage and mortgage loan business; deposits by customers were made with him. There is in evidence a leaf from a book kept by him showing that in 1913 Leon Daracius deposited $1000 with him; that he was paid interest on this amount and that on or about July 1, 1921, Daracius deposited with Klimowicz an additional $700, making a total deposit of $1700; at that time Charles Klimowicz gave to Daracius the promissory note in question, dated July 1, 1921, promising to pay on demand the $1700. There was believable evidence that these circumstances gave rise to the note, although the administrator testified to the contrary.

About a month or six weeks thereafter Mr. Daracius came to the home of Mr. and Mrs. Klimowicz and said that the note was not good without the signature of Mrs. Klimowicz; there was some argument about the matter but, Daracius insisting, Klimowicz asked his wife to sign it; she at first objected, saying that she had received nothing, as it was solely her husband's business, but was finally persuaded to sign it.

As against this Leo Daracius, the administrator, gave testimony which is difficult to accept as the truth. For instance, he said he was eight years old in July, 1921, and one Sunday morning at this time, coming out of church, he heard Mr. Klimowicz ask his father for a loan; that they, with Mrs. Klimowicz, went to Mrs. Klimowicz's home, had a drink and talked the matter over; that his father, Leon Daracius, said he would give Mr. Klimowicz the money, and witness went with his father to the Pullman bank one evening and his father drew out $1800; that they subsequently went to the office of Klimowicz, and Charles Klimowicz and his wife

Alzbieta then and there signed the note and his father counted out $1700 in cash. Although the trial was nearly sixteen years thereafter, he remembered distinctly that his father counted out the currency given to Klimowicz, and he described the denominations as ten, twenty and five dollar bills; that he remembers he came home from school that day and went with his father to Klimowicz's office. There was believable evidence that the school was not in session at the time, July 1st, but was in summer vacation. There were many other discrepancies and improbabilities in the testimony of Leo Daracius. A verdict based on such unbelievable testimony should not stand.

However, a further consideration calls for a reversal of the judgment without remanding. The note was payable on demand, dated July 1, 1921, and suit was commenced September 5, 1935, Defendant pleaded the ten year statute of limitations and upon trial moved the court to instruct the jury to find for the defendant on the ground that more than ten years had elapsed between the date of the note and the commencement of the suit, which motion was overruled on the ground that defendant had paid interest on the note.

In her statement of defense defendant admitted that she had paid interest on the note until about July 1, 1935, but alleged that she paid this, not because she was legally obligated, but because she believed she was morally obligated to do so to protect the good name and memory of her deceased husband. She also denied that she was indebted to plaintiff's intestate in any sum, denied that she delivered the note for a good and valuable consideration, and denied generally any liability.

Defendant testified that in January, 1936, after the death of her husband, Leo Daracius presented the note to her and she disclaimed any liability, telling him that her husband got the money

and not she; that Leo wanted her to sign a new note because the old note was no good any more, but she declined to give a new note. It should be noted that this interview took place after suit was commenced and it was not denied upon the trial. Standing alone, the payment of interest on the note after the statute of limitations had run would be construed as recognizing her obligation on the note and would lift the bar of the statute. Lyman v. Zearing, 187 Ill. App. 361; But where such payments are coupled with a disclaimer of liability on the note they cannot be relied upon to revive the debt. Kallenbach v. Dickinson, 100 Ill. 427; McGrew v. Forsyth, 80 Ill. 596; Miller v. Cinnamon, 168 Ill. 447, 455. The general rule is stated in 37 C. J. 1119: "It would appear to be the better rule that the entire acknowledgment, whether verbal or written, must be considered, as well the parts which qualify or negative as those which seem to admit the debt, and that the creditor will not be permitted to accept an acknowledgment and reject a condition or qualification." And at page 1116, sec. 596, of the same work it is said: "** in order to revive a debt by an admission in pleading, there must ordinarily be implied from it a recognition of a subsisting obligation and a willingness to pay, otherwise it is insufficient." These statements are supported by numerous citations.

Payments of interest by defendant appear only in her statement of defense, in which she disclaims all liability on the note but asserts that these payments were made "to protect the good name and memory of her deceased husband." We must conclude, therefore, that there is no evidence of any payment by defendant after the statute had run made with the intention of recognizing the debt as her obligation, and the payments of interest under such circumstances were not sufficient to revive the note. Recovery on the note is therefore barred by the statute of limitations.

For the reasons indicated the judgment is reversed without remanding the cause.

REVERSED.

O'Connor, P. J., and Matchett, J., concur.

39570

JOHN E. HOFFMAN, Trading as HOFFMAN ELECTRIC COMPANY, not Inc.,
(Complainant) Appellant,

vs.

LAKE VIEW AVENUE BUILDING CORPORATION, a Corporation, AVERY BRANDAGE COMPANY, a Corporation, et al.,
(Defendants) Appellees
and Cross-Appellants.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

293 I.A. 627

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On May 9, 1923, complainant filed his bill to foreclose a mechanic's lien under contract made by him with Avery Brandage Company, a corporation, on September 2, 1922, whereby plaintiff agreed to furnish and install certain electrical wiring, appliances and equipment in a building being erected on the premises known as 2432-42 Lakeview avenue in Chicago. The Avery Brandage company was the general contractor for the erection of the building, which is one of the largest apartment buildings in Chicago, containing more than 700 rooms. By the contract plaintiff agreed to furnish, deliver and install complete in every respect, on or before the 9th of April, 1923, "all of the electric work required for the construction and completion" of the building according to specifications of Rissman & Hirschfeld, architects in charge. The original price named was $52,200, which after various modifications of the specifications had been made it is agreed was reduced to $46,620. A copy of the contract is attached to the bill. It consists of 32 paragraphs, and provides among other things that the subcontractor shall abide by the general conditions in the architects' specifications so far as they relate to his work; that when any provision of the contract is at variance with the plans and specifications, the contract shall govern; that the general contractor shall furnish drawings or explanations as may be provided by the architect to detail and illustrate

the work to be done; that the general contractor may make any additions to or alterations or deviations from the drawings or specifications without invalidating the agreement, and that the fair value of the work added or omitted shall be computed and the amount so ascertained shall be added to or deducted from the contract price; that no change, however, shall be made except upon a written order properly signed by the general contractor or his authorized agent; that the subcontractor shall not sublet his contract, shall comply with ordinances and statutes which provide for the inspection of his work by the architect and the general contractor; that the subcontractor waives the requirements of written notices; that no assignment of the contract or money due under it can be made without the written consent of the general contractor. The contract expressly provides, "All previous communications between the parties hereto, either oral or written, are hereby abrogated and withdrawn, and this agreement, together with the specifications and plans referred to herein, constitutes the whole contract between the parties."

The bill alleges that complainant began work under the contract on September 13, 1926, and completed the same on February 8, 1928; that extra and additional work and material were furnished to the amount of $6423.72; that payments under the contract were made to the amount of $41,250, and that there is a balance due of $11,793.72; that notice of lien was served on the architects and on the owner on March 31, 1928. The bill prayed for an accounting, foreclosure and sale.

The Avery Brundage company answered admitting the execution of the contract and that it was the general contractor. It averred that on March 16, 1928, it had filed with the clerk of the Circuit court a claim for lien against the owner of the premises for the amount of $586,960.98. The answer set up no specific affirmative

defense to the plaintiff's claim for lien. The defendant owner, the Lakeview Avenue Building Corporation, answered that it was not informed as to the matters alleged. The cause was put at issue and referred to a special commissioner, who found for the plaintiff and that plaintiff was entitled to a lien for the sum of $10,045.22 with interest at 5% from February 8, 1928, and costs. Objections filed were overruled by the commissioner. Thereafter on motion of the Brundage company an order for rereference to take additional evidence was granted, and the commissioner, after taking such evidence, filed a supplemental report in substance to the effect that the findings and recommendations of the original report dated November 29, 1935, and filed January 21, 1936, stand. The cause was heard by the chancellor upon exceptions to these reports and a decree was entered February 15, 1937. The exceptions of the Avery Brundage company were sustained as to certain claimed items, and the court found that plaintiff was entitled to a lien in the amount of $3562.41 only, and that the costs should be apportioned. From that decree plaintiff has appealed, contending he should have been given a lien for the full amount claimed. The Avery Brundage company has filed a cross-appeal, contending that plaintiff is not entitled to any lien at all.

The building involved is owned by the Lakeview Avenue Building Corporation. It is a 19 story fireproof structure. The contract between the Avery Brundage company and the owner is not in evidence. Rissman & Hirschfeld were the architects. The construction of the building was begun in the spring of 1926. The contract for the electrical work was not entered into until September 2, 1926, and the first work was done under the contract on September 13th thereafter.

It is contended by defendant that plaintiff is not entitled to a lien at all because the notice of claim for lien was not served

personally on the owner and architects as required by section 24 of the Mechanic's Lien statute; because it was not served within 60 days of the completion of the building and because under the terms of plaintiff's contract, complainant was required to furnish labor and materials which consisted of non-lienable items and no evidence was offered whereby such items could be segregated; because complainant did not institute suit to perfect his lien within four months of the time the final payment was due under the contract as required by section 33 of the Mechanic's Lien act. We are not impressed by any one of these contentions. No one of them was raised in the trial court by answer to the bill, by objection to the commissioner's report or exception thereto. We are not unaware, as defendants point out, that the lien is purely statutory and that the statute must be strictly construed against the claimant as to requirements upon which his right to a lien depends. Decatur Lumber Co. v. Crail, 350 Ill. 319, 324, following many other cases also cited in defendant's brief, so holds. However, the Supreme court has also declared that the rule announced in these cases is not to be applied in such a way as to create pitfalls for the unwary and those acting in good faith, and in effect that the statute should be given a reasonable construction so as to make it effectual. I. Lurya Lumber Co. v. Bernstein, 168 Ill. App. 77; Beaudry v. Bell, 250 Ill. App. 468-471; United Cork Companies v. Volland, 365 Ill. 564. Moreover, the statute is not construed so strictly where, as here, the rights of third parties have not intervened. Schwulst Gerling Co. v. Frost, 269 Ill. App. 213. We have examined the record with reference to defendant's contentions in this respect and find them to be without merit even if defendant could for the first time raise these questions in this court. In the trial court defendants did not at any time specifically question plaintiff's right to a lien. The authorities are clear to the effect that the question as to

whether notice of the claim for lien was served as required by the statute cannot be raised in this court in the absence of specific objections or exceptions. Springer v. Kroeschell, 161 Ill. 358, 370; Moffett v. Hanner, 154 Ill. 649, 655. Nor can the question of timely service of that notice be raised under like circumstances, Roeder v. Pipe, 235 Ill. App. 89; Jones & Dommersnas Co. v. Hamilton Crary, 234 Ill. 26; 40 C. J. 513 (sec. 765.) Indeed, we doubt on this record (in view of the provision of section 24 of the Lien Act that notice shall not be necessary where the sworn statement of the contractor serves to give the owner actual notice) whether any further notice was necessary. Nielsen v. Encnius, 212 Ill. App. 409, 413, and Western Plumbing Supply Co. v. Horn, 269 Ill. App. 612, 619. As to the contention that certain items were non-lienable, these items in view of the total contract price were insignificant in amount and will be ignored under the maxim of de minimis non curat lex. Jennet Bridge & Iron Works v. Churchill, 182 Ill. App. 548, 553. Moreover, the proof shows payments made on the original contract amounting to $41,250, and these would under the well known rule of equity be applied first to the satisfaction of non-lienable items. Mutual Construction Co. v. Baker, 237 Ill. App. 596, 605; Young v. Bergner, 243 Ill. App. 475, 477, 478. The commissioner found that the work was completed on February 8, 1923. The suit was filed May 9, 1923, so that there was no merit in the contention that it was not filed in time. We hold plaintiff is entitled to a lien for any sum due under his contract.

The first item in controversy is a claim of $1383.80 which the decree charges against complainant on account of primary wiring. The controversy between the parties came about in this way. The building is situated in a district serviced by the Commonwealth Edison Company and served by a current of 4,400 voltage. Before

this current could be used in and about the building it had to be run through a transformer by which the voltage would be reduced to 110-220. The wiring by which this high voltage current was carried to the transformer is called "primary wiring," and the lower voltage wiring used to carry the current from the transformer to the various parts of the building is known as "secondary wiring." The commissioner found that this item of $1383.80 should not be charged to the plaintiff subcontractor. The decree sustaining exceptions of defendant to the report of the commissioner found that plaintiff was obligated under the terms of its contract to pay this bill. The installation had already been made at the time the subcontract was executed. Indeed, the uncontradicted evidence shows that this "primary wiring" could under no circumstances have been put in by anyone except the Commonwealth Edison company, which was itself a subcontractor. The testimony of the architect Mr. Rissman and the architects' superintendent, Mr. Campbell, is to the effect that this work was done by the Commonwealth Edison company prior to the end of September, 1926, and that the Hoffman Electric Company could not have brought in the wiring from the high tension wires to the transformer; that the Commonwealth Edison Company did not usually permit other people to do this work. Generally speaking, a contract is interpreted as speaking prospectively, not retrospectively. Presumptively it deals only with the future. Bartlett v. Wheeler, 96 Ill. App. 342, 346. While some sections of the specifications might seem to give color to defendant's contention, we think it is clear that if it had been the intention of the parties that the subcontractor should be charged with the payment of this item, the contract would have specifically so provided. It is quite impossible to believe that the insertion of such a provision in the contract would have been overlooked by the experts who drew it if that had been the intention. The fact that no such claim was specifically set up

in the answer or by way of counterclaim in the pleadings indicates that this defense was an afterthought. We hold that the special commissioner correctly refused to deduct the amount of this item from the sum due, and that the decree errs in sustaining the exception of defendant to the item.

A second item in controversy between the parties concerns a deduction of $2022.18 made by the decree from the amount found due by the commissioner upon the claim of an omission on the part of plaintiff to furnish temporary wiring for light and power. The uncontradicted evidence shows that defendant, as general contractor, arranged with the Thomas Elevator company to do work of this kind and furnish materials therefor for which it was paid by the general contractor for one item the sum of $671.49 and the other $1350.69, a total of $2022.18, which the decree deducts from the amount the Commissioner found to be due to plaintiff. The evidence submitted does not show whether these items were on account of wiring for temporary lighting or for temporary power. The specifications seem to be specific to the effect that the general contractor was obligated to furnish temporary wiring for lighting. Article 63 of the specifications headed "Temporary Lighting" provides:

> "General Contractor shall do all wiring, furnish, install and maintain all lamps and all equipment required for temporary lighting of the building for construction purposes and shall pay all fees and pay for all current required for same."

Indeed, upon the hearing counsel for defendant conceded that under the specifications plaintiff was not required to furnish the bulbs for temporary lighting. Notwithstanding this concession evidence was introduced on this point and the court allowed the amounts proved as a part of the $2022.18. Mr. Ravenfeld, defendant's foreman, testified with reference to the Thomas Elevator Company, "They do all our work and temporary wiring." He also says, "Mr. Nelson, the general superintendent, told me to call Thomas Elevator Co. to do

the temporary wiring." The evidence of defendant shows that the temporary power lines were run in on August 19, 1926, and that the first installment of equipment was in May, 1926. The evidence is uncontradicted to the effect that plaintiff at no time refused any request made by defendant that he do work of this or any other kind, and in view of the fact that most of it was done before the subcontract with plaintiff was executed, it is quite impossible to think that a provision obligating plaintiff to pay for this work and material would have been omitted from his contract if it had been the intention of the parties that he should pay it. Here again the fact that neither in the correspondence between the parties nor in the pleadings filed in response to plaintiff's bill was any claim of this kind set up makes it very difficult to believe that it was the intention of the parties that plaintiff should assume these obligations. We hold the decree was in error in making this deduction of $2022.18.

Other items in controversy between the parties are defendant's counterclaims for $1009.08 said to be for plaster patching, $47.65 for canvas patching, $150 for glass breakage, $52 for hoisting material, and $16 for burning conduits, making a total of $1274.73. Again it is significant, we think, that nowhere in its pleading does defendant make claim for these items. These claims should have been pleaded if defendant Grundage Company was to avail itself of them. Illinois Interior Finish Co. v. Poenie, 277 Ill. App. 554, 569; 4 C. J. S. 456 (Sec. 237); 9 C. J. 871 (Sec. 210). The plaintiff, however, did not interpose this defense in the trial court. No objection was made to the sufficiency of the pleading. Raised upon appeal in this court for the first time, the defense is not available.

The hoisting material and conduit items are not challenged, but plaintiff contends that the other back charges are wholly unwarranted.

While plaintiff cannot prevail in this court on the ground the counterclaim was not pleaded, the fact that such defense did not occur to the defendant until the cause came on for hearing is not without some weight. The claim of defendant is apparently based upon the last clause of section 9 of the contract, by which the subcontractor, after agreeing to comply with all laws, ordinances, etc., and to furnish and pay for certificates of inspection, concludes: "The subcontractor shall pay for all water, light, and fuel used for his work and shall repair any damage to any property, street, or pavements caused by operations under his control." Defendant also argues that Articles 233 and 285 of the specifications are applicable. Article 233 provides that patching of the plaster work must be done in a proper manner, and that the cost shall be charged to each contractor prorated by the general contractor in the final settlement, while Article 285 provides that the cost of replacing broken glass will be prorated among all the contractors engaged on the building. The reference in Article 233 is, however, obviously to the plastering contractor, and neither that Article nor Article 285 is applicable to the electrical subcontractor, that is, to the plaintiff. Article 52 of the specifications, which covers the subject of plaster patching as related to subcontractors other than the plasterer, provides:

"When directed by the architect, the plasterer shall patch plastering damaged by man of other trades. He shall keep the time and material charges carefully and check these each day with the foreman of the trade which damaged the work, and the bills for patching shall be rendered to and paid for by the respective contractors and subcontractors. The labor and material charges shall not exceed the scale of charges in force at the date of the contract, and agreed upon between the Employing Plasterers' Association and the other associations of building contractors.

If contractors or subcontractors do not have their foreman check the cost of patching in the manner above described, or if the liability for said patching cannot be definitely determined, the amount of the bills rendered by the contractor for plastering for all such items, shall be proportioned among the various contractors by the architect and bill shall be rendered to and paid for by the respective contractor or subcontractors. The final certificate for the various contractors will not be issued until all charges for plaster patching against them have been paid. * * * * *"

In conformity with this provision the foreman for the architects, Mr. Campbell, testified that he O.K.'d all tickets for back charges. This evidence was neither produced nor satisfactorily accounted for, and defendant offered secondary evidence in support of its claims. The record seems to be devoid of any proof of actual damage to the work of the plasterer by the plaintiff or his servants. The foreman of the architects testified that he did not see why the Hoffman Electric Company should break any glass, and the foreman of defendant testified that a large proportion of the broken glass was outside glass which would not be touched by the electricians while doing their work, and that no attempt was made to ascertain who was responsible for it. There is testimony tending to show that the plastering contractor was himself responsible for considerable damage to the plastering because he covered up many of the electrical outlets with plaster, thus causing great inconvenience and expense to plaintiff in doing this work. There is no proof in the record as to the amount of damage done to the work of any other subcontractor by plaintiff. According to the testimony of the architects bills for such damage should have been rendered as the work progressed, within 30 days after the general contractor received his bill, and the general contractor was billed on the 10th of each month following delivery of materials. No bill, however, was ever rendered to plaintiff for these supposed damages. There is no testimony showing that the plasterer ever checked the time and material slips with plaintiff's foreman, and under Article 52 of the specifications the duty of prorating was upon the architects, who did not, however, perform this duty. In view of the unusual manner in which this claim was presented, that no written notice was ever served on plaintiff required by the specifications, that the plastering contractor himself on the undisputed proof is guilty of negligence, and in view of the absence of any admissible evidence tending to prove the

amount of the damages sustained by any subcontractors who it seems have at no time made any such claim against the plaintiff, the failure of the architects to apportion the damages and the lack of any proof tending to show the reasonableness and fairness of the apportionment, this counterclaim should have been disallowed and it was error to allow it in the decree.

The commissioner allowed plaintiff on account of extras the sum of $4743.22. Paragraph 5 of the decree allows only $2873.12 on this account and disallows other items claimed. Neither the decree, objections to the commissioner's report nor exceptions before the chancellor disclose any findings as to specific items allowed or disallowed. The plaintiff has submitted a table showing specific items to the number of 55, making a total amount claimed of $5078.71, of which seven items (numbers 1, 4, 6, 12, 33, 36 and 43) amounting to $696.44, were disallowed, although upon the hearing defendant admitted the claims to be valid. Other items (2, 7, 11, 13, 24, 34, 35, 37, 39, 40, 41, 42, 44, 45, 49, 5 , 51, 52, 53, 54 and 55) amounting to the sum of $1268.16 were disallowed, although the record shows evidence sufficient to prove them. As to each of these items plaintiff refers to particular parts of the abstract which sustain his contention in this respect. Plaintiff also argues that due weight should be given to the finding of the commissioner, who saw and heard the witnesses and apparently examined each one of the voluminous exhibits. Under such circumstances the finding of the commissioner is entitled to much weight and in this case there appears the unusual circumstance that his findings were reached after two examinations of the record. Gottschalk Const. Co. v. Carlson, 253 Ill. App. 520, 526; Chicago Brick Co. v. Manchester, 165 Ill. App. 114, 117. It is true, as defendant's counsel points out, that the attorney for one of the defendants upon the hearing stated that he did not wish to be bound by admissions of counsel for this defendant

until he would have a chance to check up. The record indicates the opportunity was given; that particular defendant is not here contesting plaintiff's claim. It is suggested that certain items were disclosed because the court was of the opinion that the material and labor furnished did not enhance the value of the land. This contention cannot prevail in view of the payments already made on the general claim which equity would apply first in satisfaction of unclaimable items. Extra number 2 was for $503.25. The evidence shows that this work was done on apartment "A" of the building. The work done is described in detail in the evidence of the timekeeper. The justice of plaintiff's claim as to this item was practically admitted. The claim of $490 for extra no. 24 for material furnished and work done on apartment "1" is supported by similar testimony. Both were disallowed. Under the evidence both should have been allowed.

The decree allows interest only from the date of its entry. Section 21 of the Mechanic's Lien Act provides in substance that the lienor shall have his lien with interest from the date the amount is due. There is nothing in this record to justify a reversal to apply this provision of the statute. (Ill. Rev. Stat. 1935, Chap. 82, sec. 21.) Indeed, much might be said in support of the theory that the delay in payment has been vexatious in its nature. Plaintiff was entitled to interest from the date on which his claim was due. Clark v. Patterson, 14 Ill. 365. Plaintiff also complains that the decree was erroneous in reserving jurisdiction to determine relative priority between plaintiff and other claimants. In view of the fact that no prior claims were proved, we think this contention must be sustained. Love on Mechanic's Liens, p. 271. The equities of this cause are with the plaintiff. For the errors indicated the judgment is reversed and the cause remanded with directions to overrule the exceptions to the commissioner's report and enter a decree in conformity with that report and with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

39595

MARY McLAUGHLIN,
Appellee,

vs.

S. S. KRESGE COMPANY, a Corporation,
and R. E. SIEBER,
Appellants.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

29 S.I.A. 628

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action on the case against defendant corporation and its employee, Sieber, and upon trial by jury there was a verdict for plaintiff in the sum of $1500. The court overruled motions for a new trial and in arrest and entered judgment on the verdict from which the defendants appeal.

It is contended for reversal that the verdict is contrary to the manifest weight of the evidence; that the damages allowed are grossly excessive, and that the evidence utterly failed to support the willful and wanton counts of the complaint.

The occurrence of which plaintiff complains took place in the retail store of the defendant Kresge Company at 10 S. State street, Chicago, about 6 o'clock p. m., October 29, 1932. Plaintiff is the only witness who testified in her behalf as to the actual occurrence. She says that at the time in question she went to the Kresge store, located on the west side of State street near Madison, fronting east; she went there to do some shopping; it was closing time and there were a lot of people there; at that time she saw three or four of the employees, of whom defendant Sieber was one, kicking a boy; she saw them coming toward her; everybody was running to get away, and she ran to the south door and found it closed; she then turned back, got into a bunch who were shoppers running to get away from the fight, and, as she says, "got a kick," she thought defendant Sieber, an employee of the corporation, was

the man who kicked her. By the time she got as far as the door she found it closed and some man was saying, "The other door out, please." A boy put her in a cab and sent her to Dr. Wheeler's office. Some time after the accident she returned to the store and saw the man who put her in a taxi and sent her to the doctor. She had been at the store many times but was never there before at closing time. There were two entrances into the store, a north and a south door; the south door was about 20 feet from her; she heard a commotion, saw everybody running, turned in that direction and looked; the aisle was crowded and jammed with people; she says, "The rest of the people were all trying to get out of the door and here the accident ----- I run right into the accident and I turned back." She also says that she does not think Sieber even saw her while engaged in kicking the man, but some of the shoppers picked her up; she limped through the store and walked out to the taxicab and took the elevator to the Doctor's office; her stocking was removed; some salve and a bandage were put on her limb; she was home two days and then was taken back to work; she worked continuously for about a year, taking a taxi to her work for about three weeks; she had never been hurt before; she saw Dr. Newell on November 4, 1932; he massaged her limb, put salve on and a heavy bandage; she also saw Dr. Julia Strawn; she says her leg pained and ached; the limb was swollen for about seven months; she cut the shoe to put it on; her leg swelled and started to break open about three months after the accident; it remained open about five days and then closed; from time to time since it opens and closes.

As against this testimony of the plaintiff the defendants produced six witnesses - Culbertson, Beatrice Adams, Churchill, Sieber, VanSteenberg and Dr. Walter Hawkins. With the exception of the Doctor these were employees of defendant. The evidence of the employees shows that just about the closing time a shabbily

dressed man entered the store and grabbed something from the counter. Mrs. Adams gave the emergency call, number 55½, and signified that help was needed. It was supposed the man had taken money from the counter; he ran toward the south door of the building, and Culbertson and Churchill ran after him; Culbertson, according to his testimony, reached the thief and gave him, as he says, a football tackle, put his arms around him and they went to the floor together; the thief was resisting and kicking. Churchill's testimony is to the effect that defendant Sieber was there and took part, but Sieber himself says that he was in the back part of the store and did not hear the emergency bell and took no part in the scuffle. He is corroborated on this point by all the witnesses except Churchill and the plaintiff. Every witness, however, except the plaintiff denies that Sieber kicked plaintiff, and they all agree that the thief was kicking and resisting.

Dr. Hawkins, connected with the Alexian Brothers hospital and associated with Doctors Wheeler and Sinclair, testified that the plaintiff came to his office with a slip from the Kresge store; that he took her name, address, age and occupation, and that she stated that while in the store she had been injured by receiving a kick, being struck on the right leg by a man attempting to leave the store after committing a robbery; she said he was being pursued by house detectives and in this scuffle she was struck on the leg; he says she told him she was kicked by the man who was attempting to get away.

The crucial point in the case is whether plaintiff was, as she says, accidentally kicked by Sieber or whether the kick she received was given by the resisting thief. There is nothing in the evidence which indicates that Sieber or any other employee of the Kresge company could have had any possible motive for kicking plaintiff, and if she was injured by contact with any one of them every

circumstance would indicate, as she herself says, that it was accidental. Indeed, the thief also would have no motive for intentionally kicking her. Plaintiff's case rests on her uncorroborated testimony. Churchill, it is true, says that Sieber was present but positively denies that Sieber did any kicking of plaintiff or anybody else. Three other witnesses corroborate Sieber's statement that he was not present, and say he did not know of the occurrence until after it was over. The preponderance of the evidence is to the effect that if plaintiff received a kick, it was from the thief, and the Doctor who attended her says that she told him it was the thief who kicked her. The occurrence witnesses are five to one against plaintiff. One is interested and impeached by the Doctor.

It is the duty of this court to examine the evidence and if a judgment is manifestly against the weight of the evidence to set it aside. Belden v. Innis, 34 Ill. 73; Donelson v. East St. Louis Ry. Co., 235 Ill. 625; Erick v. Aurora, E. & C. Ry. Co., 154 Ill. App. 277; Koliakoff v. Chicago Rys. Co., 162 Ill. App. 132. The verdict here is manifestly against the weight of the evidence, and in conformity with the rule announced in the foregoing cases the judgment is reversed and the cause remanded. There was no evidence tending to sustain the willful and wanton counts of the complaint.

REVERSED AND REMANDED.

O'Connor, P. J., and McSurely, J., concur.

39614

[illegible] JUDGE, [illegible] and CARRIE LEWIS,	)	[illegible] ROBERT LEWIS.
vs.	)	
CHICAGO SURFACE LINES.	)	

3

293 I.A. 628

MR. JUSTICE DAUGHERTY DELIVERED THE OPINION OF THE COURT.

The record before us in this case discloses pleas before the Honorable Jacob Berkowitz, one of the Judges of the City Court of Mattoon holding a branch court of the Superior court of Cook county in Illinois, by request of the Judges of that court. It further shows that in the case in said court, entitled as above, on April 2, 1937, the following order was entered:

"On this day again come the parties to this suit by their attorneys respectively and the jury impaneled heretofore also come, and on motion of defendant's attorney it is hereby ordered that a juror be withdrawn and the cause be and the same is hereby continued to April 16, 1937, and on motion of court it is hereby ordered that the plaintiff Robert Lewis be and he is hereby sentenced to six months in the County jail for contempt of court.

ENTER: Jacob Berkowitz, Judge
Dated April 2, 1937."

From this order Lewis has perfected this appeal.

Neither the State's attorney nor any other attorney has appeared in support of this order, which must be reversed. It does not show whether the alleged contempt was committed in the court or out of it. It does not set forth the facts constituting the alleged contempt. If the supposed offense was committed out of the presence of the court, process would be necessary to bring the defendant before the court. There was no such process. If the alleged contempt was committed in the presence of the court, it was necessary that the order of the court should recite the facts constituting the contempt. There is no such recital. A finding of facts showing guilt was necessary as a condition precedent to

judgment. There is no such finding. If the contempt was in the presence of the court it was necessary that the order should show that defendant was present in the court. It does not disclose his presence. All these facts are elementary and have been decided so often that it should not be necessary to repeat. People v. Bain, 268 Ill. App. 152; People v. Furman, 269 Ill. App. 381; Liebman v. People, 232 Ill. App. 584; People v. Hogan, 256 Ill. 496; People v. Taylor, 233 Ill. App. 143. See also Rawson v. Rawson, 35 Ill. App. 505.

The order is reversed.

REVERSED.

O'Connor, P. J., and McSurely, J., concur.

39623

WILLIAM J. McCARTHY for use of MARGARET M. McCARTHY, Appellee,	)	APPEAL FROM SUPERIOR COURT
vs.	)	OF COOK COUNTY.
CHICAGO TITLE AND TRUST COMPANY, a Corporation, et al., Defendants Below. On Appeal of WILLIAM J. FORTUNE, Appellant.	)	293 I.A. 628

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

This is an appeal by William J. Fortune, intervening petitioner, from a judgment entered February 5, 1937, in an action of garnishment brought by Margaret M. McCarthy, judgment creditor of William J. McCartny against the Chicago Title & Trust Company as garnishee. The record shows that the garnishment was based upon a judgment rendered in the Superior court of Cook county at the December term of that court, 1936, in favor of Margaret M. McCarthy and against W. J. McCarthy for $63,225; that execution was issued to the sheriff and returned, "no property found." Affidavit for garnishment was filed in the Superior court January 5, 1937, and the Chicago Title & Trust company was served as garnishee on January 7, 1937. The Chicago Title & Trust Company filed its answer as garnishee January 16, 1937. The answer set up that on July 7, 1921, Andrew J. Ryan executed and delivered to the garnishee a written instrument known as a guarantee security contract. The contract is set up verbatim. It recites that Ryan has deposited with the Chicago Title & Trust Company 6 Public Service Company of Northern Illinois bonds for the sum of $1,000 each, giving the number of them, with interest cpupons attached, to constitute a fund under the absolute control of the company and to indemnify it against loss, damages, costs, expenses and attorney's or solicitor's

fees which it may suffer or expend or to which it may be entitled as guarantor or abstractor of the title to certain real estate described by reason or on account of liens, claims or encumbrances which exist by reason of a bill filed May 5, 1921, in the Circuit court of Cook county, Illinois, case number B-73926 of Margaret M. McCarthy against William J. McCarthy et al., to declare null and void a warranty deed from Dennis McCarthy to James Jenning. Also claims against the estate of Catherine McCarthy, deceased. The writing provides that the trust company shall have the right at any time to convert the fund by public or private sale without notice into money; that such fund and every portion thereof may be used or applied in its discretion to the payment, discharge, satisfaction or removal from the title to the premises of such liens, claims, encumbrances and defects; that out of the surplus of the fund, if any remain, the company shall retain an amount sufficient to reimburse it for loss, damage, costs, expenses, attorney's and solicitor's fees, etc., and pay the balance to the order of Andrew J. Ryan, his executors, administrators or assigns; that in case of litigation involving the fund, the costs, expenses and attorney's fees of the company are to be paid out of the fund; that when the liens, claims, etc., are discharged or satisfied or removed to the satisfaction of the Trust company (as to which it shall be the sole judge), without the use of the fund, the same, after deducting costs, expenses, etc., shall be paid to Ryan or his executors. This writing is dated July 7, 1921. The answer of the Trust company sets up that these bonds were delivered to the garnishee on July 7, 1921, pursuant to the terms of the above guarantee security contract; that the garnishee issued its policy of insurance guaranteeing the title to the real estate in question. The Trust company further answering as garnishee states the fact to be that these bonds were at the time of the deposit the property of William J. McCarthy,

and that Ryan in placing them with the Trust company was acting as agent of and with full knowledge, consent and authority of William J. McCarthy. The answer also states that the right of the garnishee to retain these bonds was affirmed and adjudicated by an order entered May 15, 1924; that an appeal was taken from that order to the Appellate court of Illinois, which affirmed the order of the trial court; (McCarthy v. McCarthy, 238 Ill. App. 618) that the garnishee is entitled to retain the bonds and the proceeds and accumulations thereof for the purposes set forth in the contract of indemnity. The answer also states that the garnishee has been served with a summons in an attachment proceeding in the case of William J. McCarthy for the use of William J.Fortune v. Chicago Title & Trust Company in the Circuit court of Cook county, case No. 36 C 10797, and that the proceeding was presently pending.

January 20, 1937, on motion of plaintiff the Superior court entered an order requiring William J. Fortune to within ten days assert his claim in that court and cause to the chattels and effects in possession of the Chicago Title and Trust Company. Pursuant to that order Fortune filed his petition, claiming that he was entitled to these credits and effects, etc., owned by or due to William J. McCarthy. In support of his claim he set up that on September 21, 1936, he brought an attachment suit in the Circuit court of Cook county in an action at law against William J. McCarthy to recover a judgment for the sum of $25,184.06; that he duly filed a complaint in said cause on September 21, 1936, and on that date filed an affidavit for attachment and an attachment bond; that the writ issued out of the office of the clerk of the Circuit court September 21, 1936, directed to the Chicago Title & Trust Company and Daniel S. Jerka; that the sheriff returned the writ that neither McCarthy nor his property was found within the county and that the writ was served on the Chicago Title & Trust Company and Daniel S. Jerka on that day;

that the Chicago Title & Trust Co. filed its answer October 23, 1936, and that notice was served upon its counsel September 9th of a motion praying the issues be set for hearing; that an affidavit of non-residence of McCarthy was filed September 23, 1936, and the certificate of mailing notice by the clerk and certificate of publication by the Law Bulletin Publishing Company were also filed; that a hearing was had on December 27, 1936, on the issues so formed, at which evidence was introduced showing that the Chicago Title & Trust Co. held in its possession the 6 bonds above described, together with the sum of $3,030.36 in cash, all of which were proved to be the property of William J. McCarthy; that the Judge of the Circuit court indicated he would sustain the attachment, and directed claimant to proceed with necessary steps to secure a judgment in the main case against McCarthy. The petition of Fortune also alleges that by reason of the foregoing prior proceedings and especially by virtue of the service of the writ of attachment on the Chicago Title & Trust Company on September 22, 1936, prior to the beginning of Mrs. McCarthy's garnishment suit, he has a lien upon the assets in the hands of the garnishee belonging to William J. McCarthy which is superior to that of either Margaret M. or William J. McCarthy. He therefore prays that the proceedings of Margaret M. McCarthy be dismissed, or, in the alternative, continued until the Circuit court of Cook county shall finally dispose of his attachment suit begin there. The court heard the evidence, which tended to sustain the averments of the petition of Fortune and the answer of the garnishee; denied the prayer of Fortune's petition and entered judgment in favor of Mrs. McCarthy, as already stated.

The litigation between the McCarthys has been long continued and has reached this court several times. In the case of McCarthy v. McCarthy, 238 Ill. App. 618, the Third Division of this

court held that the bonds and property here in question belonged to William J. McCarthy; that the same were held by the Title & Trust Company subject to the pledge set up in its answer, and that they were not subject to garnishment. The evidence in this case shows that when the Chicago Title & Trust Co. was served as garnishee in the attachment proceeding in the Circuit court begun by Fortune September 22, 1936, the garnishee still held this property under the indemnity agreement; that the same was not subject to garnishment, and that under its proceeding of that date Fortune was not entitled to recover anyt ing against the garnishee. Thereafter, however, Mrs. McCarthy tendered to the Trust company deeds, the effect of which was to clear up the encumbrances on the title on account of which the indemnity agreement was made. Paragraph 22 of chapter 62 of the Garnishment Act (Ill. State Bar Ass'n Stats., 1937) provides in substance that if in case of garnishment the goods and chattels, etc., are held for any purpose other than to secure the payment of money, and if the contract, condition or other thing to be performed is such that it can be performed by the plaintiff without damage to the other parties, the court or justice of the peace may make an order for the performance thereof by the plaintiff, and that upon such performance or a tender, the garnishee shall deliver the goods, chattels and effects in the manner provided by the statute to the officer who holds the execution. Margaret McCarthy, by tender of the deeds removing the encumbrances upon the real estate for which the indemnity had been taken, was able to avail herself of this statute. Section 11 of the Garnishment act provides that adverse claimants may be required by notice to maintain their supposed rights. The appellant did this but the evidence clearly showed that at the time his writ of attachment was served the garnishee had nothing in its hands subject to the writ. It also appeared that by the subsequent proceedings and by her delivery of the deeds the

property became subject to the later garnishment proceeding begun by Mrs. McCarthy. As a matter of fact, no final judgment in the attachment proceedings was obtained by Fortune against McCarthy. He could not thus postpone indefinitely recognition of the rights of Margaret M. McCarthy. His writ did not have the effect of putting the property in the custody of the law because at the time of the service of the writ there was no property in the hands of the garnishee which could be appropriated by it. Fortune complains that the judgment is not in the proper form in that it is rendered in favor of Margaret M. McCarthy, whereas it should have been in the name of William J. McCarthy for the use of Margaret M. McCarthy. The garnishee makes no complaint. If we assume that the intervening petitioner has a right to raise this question it is not ground for reversal since the judgment may be amended in this regard in this court under Section 92 of the Civil Practice Act (Ill. State Bar Stats. 1937, chap. 110, p. 2415.)

The judgment of the trial court is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39667

JOHN KEMPER,
Appellee,

vs.

CELINA FOURNIER, Executrix of the Estate of Palite Gadbois, Deceased,
Appellant.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

293 I.A. 629

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On February 24, 1937, the executrix of the will of Palite Gadbois filed in the Municipal court her motion in the nature of a writ of error coram nobis pursuant to section 72 of the Civil Practice Act (see Ill. State Bar Stats., 1937, ch. 110, and rule 209 of the Municipal court) to set aside a judgment entered by default upon personal service on October 4, 1933, against Palite Gadbois and in favor of John Kemper. In support of her motion she filed her own petition duly verified by her; the affidavit of Dr. Walter M. Maguy, who was the family physician of Palite Gadbois and his wife in their lifetime; the affidavit of John Lang, who lived at number 58 West 113th Place, Chicago, and who prior to December, 1930, and until June, 1933, resided in the same building with Palite Gadbois; also the affidavit of Alfred P. Robarge, President of the St. Louis De France, branch of the St. Vincent DePaul Charities, from which organization Palite Gadbois and his wife received charity from April, 1933, until the time of their respective deaths. All these affidavits are to the effect that at the time the judgment against Gadbois and in favor of Kemper was entered the defendant, Palite Gadbois, was mentally incompetent and wholly incapacitated to manage his own affairs. The affidavit of the executrix also disclosed that the claim of Kemper was for rent alleged to be due on account of the occupation of the premises known as 119 West 110th street, Chicago. As a defense and counterclaim to said demand the executrix avers

in her petition that prior to November 25, 1930, Palite Gadbois was the owner of these premises and occupied them; that on or about that time he and his wife by warranty deed conveyed the premises to the plaintiff Kemper and his wife for a consideration stated in the deed to be, "$10.00 and other good and valuable considerations"; that the value of the premises at that time was between $3500 and $4000; that the actual consideration agreed to be paid by plaintiff therefor was $2000 in cash and the assumption of certain liens on the premises amounting to about $775; that also as a partial consideration for said conveyance Kemper agreed that Gadbois and his wife and the survivor of them should have the right to possession of the basement flat in the residence building on the premises for the period of their natural lives, upon payment therefor to plaintiff of a rental of $5 a month; that this rent as agreed upon was paid by Palite Gadbois to plaintiff for December, 1930, and January, February and March, 1931; that about April 1, 1931, plaintiff demanded that Palite Gadbois thereafter pay $10 a month as rent, and threatened to evict Palite Gadbois if he refused to pay that amount; that Gadbois, then in a feeble condition both mentally and physically, moved by fear, complied with the unjust demand and paid to plaintiff $10 a month until on or about November 13, 1931, at which time plaintiff demanded $60 advance payment for rent of the premises and again threatened to evict Gadbois unless he complied with this demand; that again under fear of eviction Gadbois paid said sum; that on or about June 1, 1932, plaintiff demanded that Gadbois pay as rent for the premises $15 a month and again threatened eviction, on account of which Gadbois, intimidated, complied and paid the amount from June 1, 1932, to November, 1932; that Gadbois lost the money he had received from the sale of the real estate through the failure of a bank in which he deposited it in January, 1932; that

on June 14, 1933, plaintiff forced Palite Gadbois to vacate the premises, whereupon the petitioner, to prevent Gadbois and his wife going to the County poorhouse, took them into her own home and cared for and nursed them until their death; that Mrs. Gadbois died July 27, 1934, and Palite Gadbois on February 1, 1936; that during the time Palite Gadbois and his wife occupied the house they paid to plaintiff a sum which exceeded the amount due by $95; that from the month of June, 1933, until the date of the death of Palite Gadbois the plaintiff held possession of the basement flat, and he became obligated to pay Palite Gadbois the reasonable rental value thereof in excess of $5 a month, or a total amount of $310; that this defense was not interposed by Palite Gadbois at the time judgment was taken because of his mental condition. There is no denial of the facts as stated in these affidavits and in the petition of the executrix. It, therefore, must be assumed they are true.

In this state of the record the judgment against the deceased should have been set aside and the executrix given an opportunity to present her defense upon the merits. There are numerous cases to this effect, of which we cite only a few: Mitchell v. King, 187 Ill. 452; Consolidated Coal Co. v. Geltjen, 189 Ill. 55; Baird & Warner v. Noble, 250 Ill. App. 253; Marabia v. Thompson Hospital, 309 Ill. 147. The plaintiff, Kemper, has not appeared in this court to support the judgment. It will therefore be reversed and the cause remanded with directions to set aside the judgment and grant a trial of the original cause upon the merits.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and McSurely, J., concur.

39727

STEVE GEMBALA,
Appellant,

vs.

ST. FLORYAN BUILDING & LOAN ASSOCIATION, an Illinois Corporation,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

29 Ill. App. 629

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The plaintiff, Gembala, appeals from a judgment entered in favor of the defendant on the finding of the court. The plaintiff's suit is unusual in that he sues as the assignee of his own trustee in bankruptcy. The claim was acquired by plaintiff on October 13, 1936. The several paragraphs of the statement of claim in substance charge that plaintiff and his wife, Frances, on October 4, 1929, being the owners of certain described real estate, conveyed the same to defendant by way of mortgage to secure an indebtedness of $5000; that the mortgage was delivered and filed with the Registrar of Titles; that plaintiff at the same time became a member of defendant association; that defendant executed and delivered to him a book usually issued by it to persons to whom it lent money; that this book shows a loan of $5000 made to defendant and the various amounts due defendant from time to time in payment of said note up to and including December 28, 1933; but that defendant did not in truth and in fact turn over this sum or any part thereof to plaintiff and is therefore indebted to the plaintiff to that amount with interest. The second paragraph alleges that defendant issued its check dated December 3, 1929, in favor of plaintiff as payee, drawn on the Hegewisch State Bank and delivered this check to its secretary; that the secretary never delivered the check to plaintiff, to the damage of plaintiff in the sum of $5000 with legal rate of interest thereon from December 3, 1929; that defendant issued its check and delivered the same to its secretary as alleged; that

plaintiff demanded and requested the secretary to deliver the same to him, but that the secretary forged plaintiff's name to the check, cashed it and appropriated the proceeds to his own use, and that although requested has refused to pay the loan of $5000 or any part of it to plaintiff. Plaintiff's demand was for $6812.50, with interest at 5% from October 4, 1929. Defendant answered admitting some of the facts and denying others. Upon the trial the defense relied on amounts to a plea of res adjudicata. Defendant says that in the Circuit court of Cook county in the cause entitled St. Floryan's Building & Loan Association, a corporation, v. Steve Cembala et al, Case No. B-280435, on November 8, 1933, defendant filed its bill in chancery against plaintiff and others to foreclose the mortgage in question, described in plaintiff's statement of claim; that this mortgage was given to secure a loan made by the defendant to plaintiff and his wife in the sum of $5000; that this sum was evidenced by a bond of even date, executed by defendant and his wife, whereby plaintiff agreed to pay to defendant $5000 in weekly payments of $12.50 and to pay interest on the loan monthly; that in this suit in the Circuit court defendant and his wife were served with summons, filed their appearance and on February 1, 1934, an amended answer in which it alleged that defendant and his wife never received the $5000 alleged to have been lent to them, or any part thereof; that they never received any consideration for the alleged mortgage and bond; asked that the court decree that the mortgage and bond be null and void and not a lien upon the premises; that defendant and his wife also filed their counterclaim praying that the mortgage and bond be canceled as null and void, and defendant filed a reply and the plaintiff and his wife a sworn rejoinder in which they admitted that they applied for a loan of $6000; that the property was appraised and the loan recorded at $5000; they re-alleged the facts set up in their answer

as to the execution and acknowledgment of the mortgage, the bond and book No. 1295, admitting that the mortgage was registered in the office of the Registrar of Titles; alleged that they had no knowledge except by hearsay that the Building and Loan Association issued its check for $5000, and that the check was cashed on December 4, 1929; alleged they never received, saw or endorsed or authorized the endorsement of the alleged check and never received the $5000 represented by said check or any part thereof; that plaintiff accepted a personal promissory note for $5000, dated January 6, 1931, executed by Frank J. Zacharias and Jean Zacharias, and that plaintiff filed suit thereon in the Municipal Court of Chicago in February, 1933, against the said Jean Zacharias; that this cause in foreclosure was referred to a Master, who reported in favor of the complainant; that November 7, 1934, the decree was entered in favor of plaintiff and against defendant, his wife and others; that the counterclaim of plaintiff and his wife was dismissed for want of equity; that this decree in part provided:

"The plaintiff issued its check to order of defendants, Steve Gembala and Frances Gembala for the amount of the mortgage and Frank Zacharias, Secretary for the plaintiff, tendered the check for $5000 to defendants, who told Zacharias to hold it. That Zacharias only was empowered to deliver the check to defendants, and his authority ended when he offered the check to the defendants. The check has been cashed and regularly entered on the books of plaintiff and the same is a lawful indebtedness of defendants to plaintiff. There were subsequent dealings between Gembala and Zacharias as to the disposition of the said check, but the court finds they were all dealings of a personal nature as between defendants and Zacharias and did not bind plaintiff or impugn or nullify its claim as against the defendants."

The plea also averred that on February 4, 1935, plaintiff and his wife gave notice of appeal from the decree, and that on May 7, 1935, on motion of the defendant the appeal was dismissed by the Circuit Court and the decree entered became final; that afterward the real estate described in the mortgage and plaintiff's statement of claim was sold by the Master; that there was a deficiency for which plaintiff and his wife were found to be liable

under the decree. An order was entered by the court approving the report of sale and the distribution, finding the deficiency in the sum of $2736.69, for which judgment was entered against the plaintiff and his wife; that by reason of the facts alleged plaintiff is estopped from prosecuting this cause of action; that all of the issues presented in the plaintiff's statement of claim were presented in the Circuit court of Cook county; that the determination of the issues was necessary to the establishment of the genuineness of the mortgage foreclosed and the bond, and that after the determination of the validity of the mortgage and bond, the court passed upon all consideration paid by defendant for said mortgage and bond and all defenses that the plaintiff and his wife could have interposed in said cause of action. Upon the hearing of the cause plaintiff gave evidence tending to sustain the allegations of his complaint, while defendant in support of its defense of res adjudicata introduced the records of the Circuit court in case No. B-280-425 and rested its defense upon the ground that every issue set up in the claim of plaintiff had been adjudicated in favor of the defendant in that proceeding. The court found the issues in favor of the defendant and entered judgment thereon. From that judgment the plaintiff prosecutes this appeal.

Plaintiff says that it was not obligatory upon him to plead his set-off or file a counterclaim in the Circuit court; that that right is governed by statute and defendant had his election under the statute to plead his claim or reserve it for future independent action, and therefore a prior action in which such claim might have been asserted is no bar to a subsequent and independent action. He cites Morton v. Bailey, 1 Scammon Ill. 213; Hammans v. Powell-Myers, 220 Ill. App. 196, and argues that section 47 of the Civil Practice Act (Ill. State Bar Stats., 1937, chap. 110) does not change the prior law in this respect; that in order that a former

adjudication may operate as an estoppel it must be made to appear the action was embraced and determined in the former suit. Svalina v. Saravana, 341 Ill. 236. He also insists that where the victim of an injustice has at his command inconsistent remedies and is doubtful which is the right one, in the absence of facts creating an equitable estoppel he may pursue any or all of them until he recovers through one, since the prosecution of a wrong remedy to defeat will not stop him from subsequently pursuing the right one; that there is a difference between an election of remedies by a plaintiff and the mistake of a plaintiff as to which remedy is applicable. To this last point the plaintiff cites Austin v. First Trust & Savings Bank, 343 Ill. 406. That case, Svalina v. Saravana, and Norton v. Bailey, are the only cases out of the numerous citations in plaintiff's brief which he attemps to analyze. None of them is applicable or controlling. We assume it to be true that a defendant is not obligated to plead a set-off or counterclaim which is neither connected with nor arises out of the transaction upon which the plaintiff sues, but it appears here the plaintiff in his defense made in the Circuit court specifically set up his counterclaim which was not disconnected from the transaction on account of which the plaintiff there sued or here sues, but on the contrary was and is an essential part of it. In the Svalina case the defendant in an action brought upon the theory that a certain deed was fraudulent, undertook to interpose as an estoppel that the validity of the deed had been settled in a former action where it was introduced in evidence, although the question of its validity was not there in any way in issue, and the Supreme court said that there was no estoppel because the question had not been raised and determined in the former suit.

In Austin v. First Trust & Savings Bank, 343 Ill. 406, a respondent to citation proceedings which had been brought in the

Probate court, defendant's claim to the property in question upon the theory that he derived title to it by gift causa mortis. Thereafter he set up a claim that was contrary to that on which he relied to establish the gift amounted in fact to a codicil to the donor's will. It was argued that he was estopped by his former contention that he received the title as a gift, but the court said that the claims were not inconsistent, and held that he was not estopped. These cases have no application here.

The evidence, consisting of the court records, establishes beyond all doubt that every material issue of fact involved in this suit was under the pleadings necessary and appropriate to the determination of the issues of the foreclosure suit brought in the Circuit court. For example, the plaintiff now asserts that there was no indebtedness due from him to the mortgagee. As defendant in the foreclosure action he set up the defense that there was no indebtedness, no consideration; failure of consideration, and that there had been fraud in the transaction in which the mortgage and the bond were executed. In that action plaintiff sought to rescind the contract upon these grounds. The decree entered in the foreclosure case held that plaintiff was indebted to the Building and Loan Association; that there was consideration for his promise to pay; that there was no failure of consideration, and that there had been no fraud in the execution of the mortgage and the bond. These issues having been there determined, plaintiff is bound by the decree and estopped by it from contending to the contrary in this action. Brown v. Brown, 142 Ill. 400, 428. Wollenberger v. Hoover, 346 Ill. 511, 543; Glezos v. Glezos, 346 Ill. 96, 98, and Sluka v. Zielicki, 335 Ill. 202, 214. Every issue of fact on which plaintiff relies has been once tried and determined in favor of defendant and against the plaintiff. He has no right to vex defendant by two actions based on the same facts. The judgment is affirmed.

AFFIRMED.

O'Connor, P.J., and McSurely, J., concur.

39810

PEOPLE OF THE STATE OF ILLINOIS
ex rel. John S. Rusch,
Appellee,

vs.

JOSEPH ESPOSITO, TESSIE COCONATE,
JOHN J. CARTINA, GEORGE JANACIONE
and GEORGE La PORE,
Appellants.

APPEAL FROM COUNTY COURT
OF COOK COUNTY.

293 Ill. App. 629

MR. PRESIDING JUSTICE O'CONNOR
DELIVERED THE OPINION OF THE COURT.

By this appeal the respondents seek to reverse a judgment of the County court of Cook county finding them guilty of misconduct and misbehavior in the discharge of their duties as judges and clerks of a primary election held April 14, 1936, and sentencing each of them for a term of one year in the county jail.

October 9, 1937, John S. Rusch, Chief clerk of the Board of Election Commissioners of Chicago, filed a verified petition against the judges and clerks of election of the 14th Precinct of the 2 th Ward in Chicago, charging that at a primary election held April 14, 1936, he was advised and believed that the judges and clerks were guilty of misconduct and misbehavior in the performance of their duties in that they knowingly, fraudulently and unlawfully permitted 19 persons to vote more than once, 3 persons to vote whose names had been erased from the registers, and permitted 11 to vote whose names did not appear on the official registers, and made false returns of votes cast. The prayer was that a rule be entered commanding the respondents to show cause why they should not be adjudged guilty of contempt of court. On the same day an order was entered as prayed for. April 6, 1937, respondents Coconate, Cartina, Esposito, Janacione and LaPore filed their written motion to dismiss the petition, and on the same day the motion was overruled.

Afterward the case was heard and was continued from time to time and on April 28, 1937, leave was granted to respondents to file their sworn answers and affidavits to the petitions. The petitioner objected to the entry of this order and it was further ordered that all ballots be counted, to which respondents excepted, and thereupon each of the respondents filed his separate verified answer or affidavit in the nature of an answer.

Respondent Cartina set up in his verified answer that at the primary election he for the first time served as an election official; that he did not know when he arrived at the polling place what his duties were, but was assigned to check the registration books at various times; that he checked the 1935 Primary Poll Book to see that when a person called for a particular party ballot he had voted in that party in 1935 primary election; that at other times he wrote the names of voters in the poll book; that at no time during the day was any complaint made by the watchers for either of the parties or by the police officer who was stationed in the polling place; that if mistakes were made they were not wilfully or knowingly made by him, and that he acted in good faith and to the best of his ability.

LaPore set up in his verified answer that he was a laborer by occupation; that he was married and living with his wife and two children aged 7 and 5 years; that at the primary in question he, for the first time, served as a judge of election; that the only instruction he received was when the election commissioners gave him a book consisting of several hundred pages and told him the other judges would inform him as to what he was to do; that when he arrived at the polls he was assigned to handle one of the registers; that when people came in he looked to see if their names were in the register; that when a person voted he checked the name in the register; that during the day at divers times he was unable to

find certain voters' names in the proper place; that they were listed in the register under the wrong letter; the answer then sets up certain names of registered voters who were wrongfully listed under the wrong letter; that in these cases he was advised to follow a printed revision list and if the name appeared upon such list, the person was entitled to vote; that most of the voters were of Italian or Polish descent and if the poll books showed a person voting more than once, it was because of a misunderstanding of the names; that there were representatives of both parties present and a police officer was present at all times, and no complaint was made; that the errors set up in the petition were not wilfully or knowingly made, but were due to an oversight and to confusion when groups were waiting to vote; that he had completed the 6th grade in school and had never been arrested.

Respondent Esposito in his verified answer denied that he knowingly or fraudulently permitted to be done any of the things charged against him in the petition, goes into each specific charge made, and denied any wrong doing.

Respondent Janeczko filed his verified answer in which he set up that he was 30 years of age; that he lived with his wife and two children aged 7 and 5 years, and had lived in the neighborhood all his life; that he served as clerk of election at the primary in question to the best of his ability and entered the names of voters in the poll books as the votes were cast and as the names and addresses were given to him by the judges of election; that after the polls closed he tallied the votes on the tally sheets as they were called by the judges, and that he did nothing else; that he was present all the time until the ballots were counted, tallied, strung and sealed, and denied that he had knowingly done anything he was not authorized to do; that throughout the time he was working,

day and night, there were many challengers and watchers in the polling place, and that at no time was any complaint made; that several times the place was jammed with voters and that if mistakes occurred, it was due to confusion or honest mistake.

Respondent Coconate set up in her verified answer that she was a housewife living with her husband and three children aged 15, 14 and 13, and that she acted as judge at the primary election; that she had lived in the precinct for the last six years and had served before as judge of election; that she took charge of the ballots, initialing them and handing them to the voters when their names had been checked from the two registers, and then after the person voted put the ballot in the ballot box; that throughout the day representatives of a number of candidates, watchers and challengers were in the polling place, representing candidates for both parties, and that at no time was there any misconduct, nor was any complaint made; that the neighborhood is made up principally of persons of Italian descent and in this way some of the clerks may have misunderstood the names of the persons voting when they were called out by the judges because a number of the names had nearly the same sound; that since such charges were filed against her she checked the registers and found a number of voters who were shown by the registers to have voted but whose names are not listed in the poll books; she then sets up a number of names of persons who, it was charged, were allowed to vote irregularly, going into considerable detail; that there were 531 votes cast; that the voters would come in groups, and there was considerable talking and confusion, and that any mistake that might have occurred was due to her inability to handle the work; she denied that she had knowingly done any wrong; that this was the first time she had ever been accused of any wrongdoing.

No witness was called or testified. The evidence was documentary. The petitioner put in evidence the two poll books, the

two registers, the two tally sheets and a printed list of the voters of the precinct. Photostatic copies of these documents are in the record except the two registers which were certified by the trial Judge and were produced before us. The case was on hearing on a number of occasions, and near the close of the evidence the court announced that the ballots would be counted and this was accordingly done.

The respondents' theory, as stated by their counsel, is that they performed the duties imposed upon them to the best of their ability; that they did not permit anyone to vote who was not entitled to do so; that because some persons who were entitled to vote but whose names appeared under the wrong alphabetical designation in the registers, they used the printed list of registered voters; that during the entire time when respondents were performing their duties, there were present representatives of different candidates representing both parties, and a police officer, challengers and watchers, and that at no time was any complaint made; that the errors complained of were made innocently during the rush of voters in the early morning and later hours while the polls were open; that the petitioner failed to make out a prima facie case, that the finding of certain facts by the trial court is contrary to the exhibits in evidence and that the punishment inflicted was "cruel and excessive."

Complaint is made that the petition being sworn to upon "information and belief" is insufficient and that the court erred in refusing to strike it. We have many times passed on petitions of a similar character and held them sufficient. People ex rel. Rusch v. Williams, 192 Ill. App. 226. It sufficiently advised respondents of the charges made against them and there was no error in overruling defendant's motion to strike.

Complaint is also made that the court erred in striking the

respondents' sworn answers. Near the close of the evidence, counsel for petitioner said, "If there is a sworn answer filed here with leave of court, I would like to move at this time to strike the answer on the grounds that the defendants in an election fraud prosecution cannot purge themselves from contempt by a sworn answer." In reply counsel for respondents said, "The supreme court never held at any time that a sworn answer couldn't be filed. Now if the Court is going to strike the sworn answer, there is nothing before the Court. But the Court has a right to consider the sworn answer on the question, whether it does purge or not." The motion was allowed and the answers stricken. Respondents' counsel say, "This action on the part of the Court was very prejudicial. The Court refused to consider any evidence or any extenuating circumstances of the acts committed, or the alleged mistakes, which the election commissioners found after checking the records for over six months." The difficulty with this contention is that the court did not refuse to consider any evidence the respondents might see fit to offer and in fact no such offer was made. It is apparent, however, that the court did strike the answers because in such a proceeding a sworn answer could not purge, and counsel for respondents sought to have the court consider the answers on that question. We think the court should not have stricken the answers. While, obviously, respondents could not purge themselves by filing a sworn answer, they had a right to file an answer and set up their defense. But the answer is not evidence, and if respondents desired to produce evidence we think it clear they would have been permitted to do so. In this view the error, if any, was harmless.

Complaint is further made that the court erred in allowing the petitioner to offer additional evidence after petitioner had closed its case; that after the petitioner had rested, the court re-

opened the case and allowed the ballot boxes to be opened and the ballots counted. When the court stated he would have the ballots recounted, counsel said: "Let's have the record show both boxes were opened by the Judge in open court and closed again without breaking any seals on the box. The Court: Yes, sir, it is so." There is no merit in this contention. The matter was entirely within the discretion of the Judge. There is no complaint that the ballots were or might have been tampered with.

Respondents further contend the evidence failed to show which or, if any of them, was guilty of misconduct; that the sentence is excessive and that the specific findings in the judgment order are contrary to the evidence. Obviously guilt is personal. No one can be found guilty of something another person does unless there is a conspiracy or concert of action to do an illegal act. The contentions just mentioned require an analysis of the evidence.

It appears that in the judgment order the court found that the respondents unlawfully permitted 19 persons to vote more than once, 3 persons to vote whose names had been erased from the registers, and 11 to vote whose names were not in the official register. The finding followed almost verbatim the allegations of the petition, and as we understand, counsel for defendant make no contention that the finding of the court that the number of persons above mentioned voted illegally does not represent the fact, except that counsel say they were honest mistakes made without any fraud on their part. We think the court was not warranted in finding the two clerks of election were guilty of fraudulently permitting the three persons to vote whose names had been erased from the registers. There is no evidence that the clerks who wrote the names of these three persons in the poll books knew that the names had been

erased. This would only appear from the registers which were before the judges. We held in People ex rel. Busch v. Bowman, 276 Ill. App. 406, which was a contempt case similar to the one before us, that (p. 412) "the petitioner is not required to prove the guilt of respondents beyond a reasonable doubt, but is required to produce 'most convincing evidence of the truth of the charges' before the respondents could be found guilty, the proceeding being quasi criminal. Oehler v. Levy, 168 Ill. App. 41." The evidence did not meet the requirements of the law as to the two clerks in the matter of the three illegal votes. The two judges, of course, who had the register before them must be held to have known that the three persons were not authorized to vote because their names were erased from the registers, and there was no explanation on the part of the judges on the hearing; none of them testified.

The registers had been used at a number of prior elections, and an examination of them discloses the fact that they were very poorly kept. As stated, some of the voters were registered under the wrong letter of the alphabet, and it appears that the judges had a printed list of the voters who were apparently entitled to vote, which is in the record. And there is some suggestion that this list was used when the name could not be found at the time in the register.

The two poll books, of which we have a photostatic copy in the record, disclose the work was not done in an orderly way by the clerks. The names of some of the voters in each poll book does not always appear, as they should, on the same line, and there are a number of other irregularities that indicate at least carelessness on the part of the clerks. At the bottom of each poll book is a certificate to be filled out and signed by the judges and the clerks, but this was not done. In one of the "Statement of Votes" of the Democratic party, showing the number of votes each

candidate received, the judges failed to sign the certificate. In the other, two of them signed in the proper place. In the "Statement of Votes" cast by the Republican party, the certificate in one of such statements, which should have been signed by the judges, is not signed by anyone. The other is signed by the three judges. Also in the "Statement of Votes" of the Republican party, one of such statements shows that five different candidates for associate judges of the Municipal court received more than 300 votes each, while in the other statement those five are credited with no votes.

As stated, the court, near the close of the evidence, ordered the ballots recounted, which was accordingly done, and a written report made to the trial judge, which is in the record, from which it appears that the poll books show 224 Democratic and 307 Republican votes, a total of 531 cast; while the written report shows that there were but 500 ballots sent to the precinct. Nothing is said in the briefs about this discrepancy. The result of the recount shows a great many discrepancies in the result as the ballots were counted, and the number of votes indicated on the tally sheets, which in the report are designated "official" but which on oral argument counsel for petitioner said referred to the tally sheets. There were 86 Democratic candidates, 191 Republican candidates, and 2 third party candidates. The difference between the result as shown from the tally sheets and the recount of the Democratic ballots in most instances is not large. Some candidates show a loss of 4, 7, 5, 8, 1 and 2, and the highest 22, except the persons running for nomination as associate judges of the Municipal court, where some candidates made a gain of from 6 to 7 votes, while others lost from 24 to 48 votes. While the differences in the Republican vote varied considerably, for some of the offices there were gains of 11, 3, 7, 1, 22, 46; and other candidates lost votes of 13,

22, 38, 91; and as heretofore stated, some of the candidates for associate judges of the municipal court on the Republican ticket received no votes, while the recount showed some of these received more than 250 votes. The official canvass by the Board of Election Commissioners after the election is not in the record; but we were advised by counsel on one argument that in some instances candidates, such as some for associate judges of the municipal court, were given more than 300 votes, although the tally sheet showed they received none; while one of the "Statement of Votes" showed these same candidates received more than 300 votes.

From what we have said, it is clear that none of the respondents paid much attention to the duties they were, under the law, required to perform. It is certain that the least that can be said of the conduct of respondents is that they were grossly careless in the performance of their duties. In People ex rel. Busch v. Greenzeit, 277 Ill. App. 479, it was said (p. 491): "Under section 13 (Chap. 46, par. 156, Ill. Rev. Stat. 1937) the trial court had the right and power to find defendant in error guilty of misbehavior even though he did not find that the 'misbehavior' involved an act or acts of a criminal character." And in People ex rel. Busch v. Johnson, 255 Ill. App. 288, which was a case similar to the one before us, it was held that it was the plain duty of the judges of election to guard the ballot box. Obviously it is the duty of judges and clerks of election to so conduct themselves and to so keep the record of votes cast, that only persons entitled to vote may do so, and that those who do vote have their votes honestly counted. Of course some errors may occur which are honest mistakes, but such appears not to have been the fact in the case before us; and while it is said by counsel for respondents that the duties of the judges and clerks were onerous, necessarily taking a great many hours, and that although there were watchers, challengers and a police officer in the

polling place, respondents contend no could not was made of any irregularity; but there is no evidence in the record on any of these questions. None of the respondents testified nor was any witness called. In these circumstances we think it cannot be said that all the mistakes which occurred were without any criminal intent. While the evidence of misbehavior is clear and warranted the court in finding each of the respondents guilty, we are of opinion that it is not of such convincing character as to warrant the finding that each of the respondents was guilty of criminality.

Upon a consideration of all the evidence we are of opinion that if the two clerks were sentenced to jail for a period of 30 days and the judges for 60 days, the ends of justice would be subserved.

The judgment of the county court of Cook County is reversed and the cause is remanded for further proceedings in accordance with the views herein expressed.

[illegible]

McSurely and Matchett, JJ., concur.

39617

MILTON W. BROWN and MARTHA C. BROWN,
Appellees,

vs.

A. C. WOODCOCK,
Appellant.

HATTIE WOODCOCK and A. C. WOODCOCK,
(Cross Plaintiffs) Appellants,

vs.

MILTON W. BROWN,
(Cross Defendant) Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

293 I.A. 629

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

A. C. Woodcock and his wife Hattie appeal from certain adverse judgments entered upon the trial of a tort action involving a collision between two automobiles.

A Buick sedan driven by Woodcock, in which Mrs. Woodcock was riding, ran into a Nash automobile driven by Milton W. Brown, riding with his wife Martha C. Brown, seriously injuring her. The Browns brought suit for damages against Woodcock and Woodcock and his wife Hattie brought a counterclaim against Brown; upon trial before a jury Woodcock was found guilty and plaintiff Milton Brown's damages were assessed at $450 and Mrs. Brown's damages at $10,000; she remitted $2500 and judgment was entered in her favor against Woodcock for $7500 and in favor of Milton W. Brown for $450. The jury found Milton W. Brown not guilty as to the counterclaim of Mr. and Mrs. Woodcock and judgment was accordingly entered. The Woodcocks appeal from these judgments.

On the morning of December 3, 1933, A. C. Woodcock, hereafter called defendant, was driving his Buick automobile eastward on route 6, a two lane paved highway in Indiana near Gary; plaintiff Brown was driving his Nash automobile westerly on the same

highway; in defendant's car were his wife and in the rear seat Miss Lydia Nilsson; in plaintiff's car were his wife and in the rear seat his daughter with a girl friend. It had rained shortly before the accident and the roadway was wet and slippery; it has a crown pavement, sloping from the center to either side; there were signs along the highway cautioning drivers to go carefully when the road was wet.

Although there was some variant testimony, the jury could believe that defendant was driving not less than 40 miles an hour, and at times 50 to 60 miles an hour; just before the accident he passed a Ford coupe going in the same direction; defendant's car at this time was going 55 to 60 miles an hour; after passing the Ford car he quickly pulled back toward the right, into the eastbound lane, his car struck a bump in the roadway and started to skid; at this time plaintiff's car, coming westward in the westbound lane, was 200 or 300 feet away; defendant did not slacken the speed of his car, which continued to skid, but finally got over to the right side of the road; he went for some distance without slackening speed and without applying the brakes, when his car suddenly swung over to the left, into the westbound lane, and struck the oncoming plaintiff's car head-on; plaintiff's car at the time was going about 25 miles an hour.

Plaintiff charged defendant with general negligence and with wilfully and wantonly managing his automobile and injuring plaintiffs. A special interrogatory was given to the jury, as follows:

> "Was the plaintiff, Martha G. Brown, proximately injured as the result of wilful and wanton conduct on the part of the defendant, A. G. Woodcock, in the operation of his automobile on the 3rd day of December, A. D. 1933?"

To this the jury answered, "Yes."

Defendant argues that as the accident happened in Indiana his liability is governed by the law of that State, and that under

the Indiana law he could not be found guilty of both wilful and wanton conduct and negligent conduct at the same time.

The case was not tried under the Indiana law. Defendants in their counterclaim charged Brown with wilful and wanton operation of his automobile and submitted to the jury an interrogatory as to whether Brown "was guilty of wilful and wanton misconduct" in driving his automobile, causing injuries to the cross-plaintiff Mattie Woodcock. To this interrogatory the jury answered, "No." Moreover, at defendant Woodcock's request the jury was instructed as to what constituted wilful and wanton conduct and what it was necessary to prove to establish this charge. Having tried the case upon the theory that the Illinois law controlled and having submitted the interrogatory and instructions upon this theory, defendant and cross-plaintiffs cannot change their position in this court.

It is the law in this State that a wilful and wanton charge and also negligence may be embodied in one declaration and the case tried in one issue. Gore v. O'Keefe Bros. Co., 280 Ill. App. 163. See also Schoenbacher v. Kadetsky, 290 Ill. App. 28, and the specially concurring opinion in Price v. Bailey, 265 Ill. App. 358, where we quoted from Chicago City Ry. Co. v. Jordan, 215 Ill. 390, to the effect that where there is a degree of wilful or wanton recklessness which authorizes a presumption of an intention to injure, the act ceases to be merely negligent and becomes wilful or wanton. This may be proven by showing acts indicating a reckless disregard of the rights and safety of others.

The question in the instant case, whether defendant Woodcock was guilty of wilful and wanton operation of his car, was properly submitted to the jury and it could reasonably find that driving at such a high rate of speed on a slippery road showed a reckless disregard for the rights and safety of others. Reed v. Zellers, 273 Ill. App. 18; Farley v. Mitchell, 282 Ill. App. 555; Streeter v.

Humrichouse, 357 Ill. 234.

It is said that reversible error was committed in giving at plaintiffs' request instruction No. 1, which says that plaintiffs are not required "to prove their case" beyond a reasonable doubt but by a preponderance of the evidence. The instruction does not direct a verdict but merely relates to the degree of proof, and has been approved repeatedly. Arndt v. Riverview, 259 Ill. App. 216, 220; Chicago Consolidated Trac. Co. v. Schritter, 222 Ill. 364.

Plaintiffs' instruction No. 4 is criticised in referring to the negligence of defendant "as charged by the plaintiff." It is said that this gives the jury the right to find the defendant guilty of any negligence, although not charged in the complaint. The instruction does not direct a verdict. It refers only to imputed negligence, and says that even if the jury should find that plaintiff Milton W. Brown negligently drove the car, his negligence could not be imputed to the co-plaintiff, Martha J. Brown. The instruction has been approved many times. Rosch v. Chicago Railways Co., 221 Ill. App. 241, 255, and cases cited.

It cannot be said that the verdicts of the jury are against the manifest weight of the evidence.

The judgments are affirmed.

AFFIRMED.

O'Connor, P. J., and Matchett, J., concur.

39798

PEOPLE OF THE STATE OF ILLINOIS ex rel. JOHN S. RUSCH, Appellee,

vs.

SALVATORE MONTESANO, CLARENCE DAVIS, ANTHONY GATTONE, PASQUALE DONATO and LOUISE BLOUNT, Appellants.

APPEAL FROM COUNTY COURT OF COOK COUNTY.

293 I.A. 630

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

Defendants Salvatore Montesano, Clarence Davis and Anthony Gattone were judges, and Pasquale Donato and Louise Blount were clerks at a primary election held in Chicago, Cook County, Illinois, on April 14, 1936; they were charged before the county Judge with such misconduct and misbehavior as such judges and clerks as to be in contempt of court. The proceeding was based on section 13 of article 2 of the Election Law, chap. 46, par. 186, Ill. Rev. Stats. 1937. Pasquale Donato was not apprehended and the case went to hearing as to the other defendants. Clarence Davis pleaded guilty and was sentenced to ten months in the county jail. Louise Blount also pleaded guilty and she has not yet been sentenced. Defendant Salvatore Montesano and Anthony Gattone were found guilty and each sentenced to two years imprisonment in the Cook county jail; they appeal.

The trial court found that defendants were guilty in (a) permitting one judge to enter booth to mark voter's ballot, (b) permitting 62 names of persons not voting to be placed on the poll books after the polls were closed, (c) permitting 62 ballots to be cast after the polls were closed in the names of 62 persons who were not present and voting (d) permitting precinct captains after close of polls to alter and change ballots, (e) permitting precinct captains to handle, examine and count and mark ballots,

(f) making a false canvass, tally and return of votes, (g) permitting ballots to be removed from the ballot box during the voting and permitting them to be altered and changed, (h) permitting persons to vote whose names were not registered, (i) permitting 9 persons to vote whose names were erased from the registers, (j) permitting 6 instances of persons voting more than once, (k) permitting 7 persons to vote from addresses other than those appearing on the registers, and (l) permitting the ballot box to remain unlocked and open from 2 p. m. to 5 p. m. during which time voted ballots were removed from the box and altered and changed and then returned to the ballot box.

Upon this appeal counsel for the appealing defendants make a number of objections which have already been considered and determined in other cases. It is first said that the court should not have opened the ballot box and examined the ballots and tally sheets, as the statute controlling prosecutions of contempts for election frauds confines the evidence to oral evidence. In People ex rel. Rusch v. Williams, 292 Ill. App. 228, where the same point was made, we held that in such a proceeding the court must, in passing upon the charges, "consider the tally sheets, ballots, or any other documentary or oral evidence from which the court may determine the innocence or guilt of the parties accused." See also The People v. White, 334 Ill. 465, an election contempt case where the defendants were found guilty upon examination by the court of the poll lists, ballots and the tallies.

It has been decided by the Supreme court that the petition and affidavit filed, upon which the rule to show cause is based, does not violate section 2 of article 2 of the Constitution of 1870 nor the 4th and 14th amendments of the Constitution of the United States. Sherman v. The People, 210 Ill. 552, 559;

Catherwood v. Morris, 360 Ill. 473, 479; People ex rel. Rusch v. Williams, supra.

It has also been held that the Election Act is not inoperative and incomplete for its failure to fix a penalty. The People v. Enger, 364 Ill. 404, where the court said that in such a proceeding it was unnecessary for the legislature to prescribe the character of punishment, "as courts, in the exercise of their inherent power over their officers, may provide such reasonable punishment as in their judgment should be meted out." See also The People v. Kadel, 337 Ill. 169.

There is no dispute as to the facts found by the court or the guilt of defendants. But it is argued that in the light of the surrounding circumstances the sentence of two years imprisonment is excessive. The argument apparently is that Montesano was coerced, by terror, in doing what he did. Davis testified that he was one of the judges at the election and that at about 2 o'clock Pasquale Donato, one of the clerks, came up with a list and started writing names in the poll books; that witness protested and shortly after three strangers came into the polling place; that they were dark skinned and looked like Italians; that they took him into a back room and told him that they had heard that "I didn't want to go along and that unless I did I could expect most anything;" that in the morning two precinct captains came in and told witness that a deal had been made and that Johnnie Donato, the Democratic precinct captain, was to carry the precinct as much as two to one; that Johnnie Donato changed and erased certain names in the polling place during the day and that neither Gattone nor Montesano protested. Witness said that he never told anyone except his father of the men being in the polling place until he testified on the present hearing.

Louise Blount testified that several times during the day

John Donato would come in with a list of names and ask who was ahead and then order that some more names should be written in as voting, although the place at this time was vacant of voters; that Johnnie Donato was the precinct captain and the brother of Pasquale Donato. She testified that defendant Ortone would take a ballot out of the box and after it was changed it would be replaced in the box; that this happened all afternoon, and during all this time Montesano was present. There was abundance of other evidence that the primary was carried out in a reprehensible and unlawful manner.

Defendant Montesano testified that he had served as a judge of election about three years before, although in his application to be appointed judge of election at this time he stated that he had never before served; that he saw the three men walk into the back room with Davis, who returned apparently agitated; that witness made a certain objection and was told by Pasquale Donato to keep quiet, and witness says he kept quiet because he feared something might happen to him; that certain ballots were taken out of the ballot box while the polls were still open; that the precinct captain asked him to open the box so that some ballots could be examined; that the witness at first refused and then Pasquale Donato told him to go ahead; thereupon the witness handed over the key, the box was opened, some ballots were taken out by the precinct captain who took them in the back part of the room, made changes in them, brought them back and put them into the ballot box; that this was done several times. The witness testified that he had known Pasquale Donato and her brother Johnnie for eight or nine years. He testified that he was under no fear at the time and did not call up the office of the election commissioners or call the attention of the police officer to what was going on.

It should be noted that the first mention of any fear by

any of these defendants was in the first part of March, 1937, when the cause was heard in the County court. There is force in the suggestion that the point of fear was an afterthought. In People ex rel. Rusch v. Rivlin, 277 Ill. App. 183, 187, where it was argued in an election contempt case that the defendants feared bodily harm, the court said that they went to the office of the election commissioners when they left the polling place that evening, and "there is no contention that they made any complaints at that office of the happenings at the polling place during the day. If they had been coerced or dominated, as they now claim, why did they not make that fact known to the election commissioners?"

Counsel for the defendants in their brief do not point out any specific facts which would lead to the conclusion that Monteleano or Gattone were coerced into wrong doing by fear, but rather argue that because the neighborhood is poor - a mixture of Italian and Negro inhabitants - it must contain persons of a criminal character. Other neighborhoods in the city of Chicago where terrorism is said to have prevailed on election days are cited. There is nothing in the present record to warrant any conclusion that the instant precinct - the 32nd of the first ward - is composed of persons of criminal character.

The evidence conclusively shows that the two appealing defendants were in criminal collusion with others to falsify the elections. As was said in The People v. Hadel, 337 Ill. 169, the election officials deliberately betrayed their trust by making a false return, and that by so doing they not only deprived the voters of their share in the government but used it against their wishes.

As there is no dispute as to the false count we have not commented upon this in detail. It might be noted that the Democratic tally sheets showed that all candidates on the Democratic ticket, with the exception of three, received, each, 210 votes; the

recount showed that no Democratic candidate received 210 votes. There were many other discrepancies between the tally sheets and the recount.

There is no variance between the petition and the order. The People v. LaScola, 282 Ill. App. 328, cited by defendants, involved a direct contempt alleged to have been committed in the presence of the court. The instant proceeding is of another kind. The present act contemplates that the proceeding shall be summary and may proceed without a formal statement in writing as to the nature of the charge.

Defendants had a full and fair hearing as to the exact nature of the charges against them and they were given the fullest opportunity to present evidence in their defense. There is no denial of the charges and the proof amply sustains the order of commitment.

On oral argument defendants' counsel suggest that the punishment of two years imprisonment is excessive in view of the limit of one year imprisonment fixed by the statute as the penalty for conviction of a criminal violation of the Election statute (chap. 46, par. 433, 435, Ill. Rev. Stats., 1937); that this suggests the limit of imprisonment that should be imposed in a contempt proceeding. This point apparently was not made before the Supreme court in either the Enger or Madel cases, supra, but in these cases the court said that the punishment for contempt rests in the discretion of the court in the reasonable exercise of its power over its officers. See also The People v. Kotwas, 363 Ill. 336. Moreover, the evidence strongly tends to prove that the defendants were parties to a conspiracy to do an illegal act, and the penalty for this, upon conviction, is far in excess of the penalty imposed in the instant case. Chap. 38, par. 139, Ill. Rev. Stats., 1937.

Applicable to the present facts is the language of Mr. Justice Scanlan in The People ex rel. Rusch v. Johnson, 255 Ill.App.

288, 294, involving an election judge found guilty under similar circumstances. The court said: "The plaintiff in error was appointed by the County court to the honorable and important office of a judge of election. His plain duty, under his oath of office, was to guard the ballot box, but he betrayed the trust reposed in him and aided and abetted a conspiracy that had for one of its objects the placing of illegal ballots in the box. * Such a conspiracy is in its nature treasonable, for it strikes at the very life of the Republic."

We see no reason to disagree with the conclusion of the trial court and the judgment is affirmed.

AFFIRMED.

Matchett, J., concurs.

O'Connor, P. J.: I do not agree with all that is said in the opinion.

39736

JOHN L. MULROY,
Appellee,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, a Corporation,
Appellant.

APPEAL FROM CIRCUIT COURT OF COOK COUNTY.

293 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendant Insurance company in the life time of Rose A. Mulroy issued to her four industrial life insurance policies. Two of these policies were numbers 67,765,422-3, issued August 16, 1926, for the sum of $250 each, one number 75,866,535 for the sum of $220 issued October 8, 1928, and another number, 77,787,121 for the sum of $80 issued March 18, 1929. Rose Mulroy died July 2, 1930. Her son, John L. Mulroy, brought suit on these policies individually on January 17, 1936. January 15, 1937, he obtained letters of administration upon the estate of Rose A. Mulroy from the Probate court of Cook county, and on the same day was substituted as plaintiff administrator.

The first complaint in 4 paragraphs alleged the amount of the 4 policies to be $3000. It said plaintiff was unable to find the policies after "diligent search" and was therefore unable to attach them to the complaint. Thereafter plaintiff supplied information as to the numbers of the policies and photostatic copies were furnished by defendant. Plaintiff, in later pleadings, also gave information not contained in the original complaint as to the date of the death of Rose A. Mulroy. Defendant denied liability on the ground that prior to the death of Rose Ann Mulroy the policies lapsed for non-payment of premiums according to their terms, and that plaintiff failed to present proofs of loss after the death of Mrs. Mulroy as required by the policies. There was a trial by

jury and a verdict for plaintiff in the sum of $1060, on w ich the court entered judgment. Defendant contends for reversal that the verdict and the judgment were manifestly against the evidence, and this is the controlling question in the case.

By the terms of the policies premiums were payable weekly at the home office of defendant, but might be paid to an authorized representative. Payments were not to be recognized unless entered in the premium receipt book furnished to the insured by the company. If the premium was not called for when due it was the duty of the assured, before the policy was in arrears 4 weeks, to bring or send the premium to the home office or to one of the district offices of the company. In case of the death of the insured a period of grace of 4 weeks was provided. If the policy lapsed after payment of premiums for 3 full years or more, the insured was entitled to non-participating extended insurance as provided by the policy. The payment of the death benefit was conditioned upon the payment of the weekly premiums specified in each of the policies on or before each and every Monday after the policy went into effect until the anniversary date of the policy immediately preceding the 70th anniversary of the birth of the insured.

Neither the receipt books nor policies were produced by plaintiff. Mrs. John Mulroy, explaining their non-production, says that Rose A. Mulroy died at 3:20 p. m. July 2, 1930, and that one hour later on the same day she, accompanied by her sister, Miss Kathleen Hughes, took the policies and receipt books to defendant's office at 6900 N. Clark street, Chicago. She says she asked for the manager and a man came and said he was the manager; she says she gave these policies and receipt books to him and told him Mrs. Mulroy had just died; she does not know the name of this man; she does not know the name of any other person with whom she talked at that time and place; she took no receipt for the documents; she has never seen the documents

since although she says she has diligently searched for them. Miss Hughes testified that she went to the office with Mrs. Mulroy and that the office was on the second floor of the building; that they walked up to the second floor, and Mrs. Mulroy gave the policies and 7 or 8 receipt books to the man in the office; she thinks, but is not sure, that there was a sign here indicating that it was the office of the Prudential Insurance company; she says there was an information desk, but she does not remember what the man who sat at the desk looked like, nor did she remember his name. Mrs. Mulroy also testified that she paid the premiums on all the policies while living at 7053 Ravenswood avenue two weeks before the death of Mrs. Rose A. Mulroy. She said she had made this payment to a Mr. Leach; that she paid him about $8 at that time, and that the agent, Leach, came to her home several times before she made the payments. She denied that Mr. Ruehl, another agent of the defendant, called at her home after this time and denied that her husband told Ruehl that he had torn up the policies.

Plaintiff Mulroy corroborates the testimony of his wife with reference to the payment of the premiums, which he says was made to Mr. Leach in June, 1930, about two weeks prior to the death of his mother; he does not know the amount of the payment, but says he was present at 4 different times when payments of this kind were made to Mr. Leach. He says he moved to 7053 Ravenswood avenue in the spring of 1929 and moved away from there in July, 1930, after the funeral of his mother, who was living at his home when she died. Mr. Mulroy further testifies on this point inconsistently with the testimony given by his wife, that he saw the insurance policies about 3 or 4 hours after his mother died; that he got them and gave them to his wife, and that she took all the insurance policies, receipt books, etc. In another part of his testimony he says that the last time he

saw the receipt books was about 2 weeks before his mother died at the same place; he says he moved into 7053 Ravenswood avenue in 1929 but does not know what month. It was, however, in the spring; he moved away several days after his mother's funeral in July, about the 16th day of July; about 2 weeks after his mother's death he was living at 1425 E. 74th street; at about that time he went to the office of defendant company at Diversey and Racine avenues; he did not go to defendant's office on Clark street, he says, because his wife had been there already; the Diversey and Racine office was the main office and the manager told him to go there for any business; he says that his wife was present when the manager (presumably at 6900 N. Clark street) told him to go to Diversey and Racine; he asked Mr. Ruehl, he says, to investigate about the policies on his mother's life; this was shortly after she died.

Contrary to the testimony of these interested parties the records of defendant company, which were produced at the request of plaintiff, showed that as a matter of fact all the policies lapsed for non-payment of premium on July 8, 1929, six days less and one year before the death of assured. Each and all of the policies at that time had been in force for less than 3 years. The records also show that the last payment of premiums was made July 8, 1929, to an agent named Green. Mr. Ruehl testified that he had been employed by defendant company for 12 years, and that the first time he saw plaintiff was about June 1935, at plaintiff's home where he went to collect children's insurance; he says that in March, 1936, plaintiff mentioned to him the death of his mother, told him of dealings with other agents of the company with whom he did not seem to get anywhere, and asked Mr. Ruehl to look into the matter; Mr. Ruehl asked plaintiff for the policies; plaintiff said he did not have any but had the numbers in a book; Ruehl asked him where the policies were and he said he destroyed them in a fit of temper; Ruehl asked

for the premium receipt book, and plaintiff said he did not have it either, that it also was destroyed. In April, 1936, however, plaintiff gave Ruehl the numbers of the policies, taking them from a memorandum book. Ruehl saw plaintiff again and told him he would be advised by the company; at that time plaintiff was living at 3024 Wilton avenue. Ruehl says he took the policy numbers from the plaintiff but did not furnish him with any statement to fill out; Ruehl, however, notified defendant company and received back Exhibit 2, which is a statement from the books of the company showing that the policies lapsed for non-payment of premiums prior to Mrs. Mulroy's death. It was called for by plaintiff and offered and received in evidence.

Mr. Hayes, superintendent of the branch office of defendant at 6979 North Clark street, testified that he was the manager there; that Joseph J. Leach worked out of No. 12 office located at Elaine place and Lincoln avenue; Mr. Hayes says he worked in that office from 1926 to January, 1931, as assistent manager; he said Joseph J. Leach left the service of the company in June, 1929, and was not working for defendant company in either June or July, 1930. Witness said he was familiar with the way in which claims were made on industrial insurance policies; usually an agent was called in, took the claimant's statement, brought in the policy with the doctor's form and turned it over to the superintendent; if everything was clear the superintendent was authorized to direct a check for settlement in full. Mr. Hayes says he never had a talk with Mrs. John Mulroy about the insurance on the life of Rose Ann Mulroy, and that he didntt think he ever met Mrs. Mulroy; that the Clark street office never had a man at the information desk; it had always been a young lady, and that a Mr. Green succeeded Mr. Leach and assumed charge of Leach's territory when he resigned in June, 1929; he said the first

time he had heard anything about the claims of plaintiff was in the early part of 1936, Mrs. Mulroy said that Hayes was not the man to whom she gave the receipts and policies, and that she had never seen him at the North Clark street office.

Ralph E. Jarl testified that he was employed by Frank W. Pearson, Inc., an insurance service company; that in 1929 he knew a Joseph J. Leach, who was connected with his organization during that year; that Leach joined the organization in July, 1929; that he signed a two year contract bearing date July 3, 1929. The application of Leach to Frank W. Pearson, Inc., for a position is in evidence and bears date July 3, 1929. Jarl said Mr. Leach was assigned by the company in June, 1930, to Kings county in New York City; that in May, 1930, he was in Hudson county, New Jersey, and that about the middle of June he was assigned to Kings county, New York, and was there in July, August and October, 1930, and worked for their company up to January, 1934, since which time witness had not seen him. The record indicates that Mr. Leach himself was in Michigan but not available as a witness at the trial.

Upon a consideration of the entire record we are constrained to hold that the verdict of the jury is clearly and manifestly against the weight of the evidence. Disregarding inconsistencies between the testimony of plaintiff and his wife and their evident interest in the results of the suit, the testimony given by them seems highly improbable. That Mrs. Mulroy would take insurance papers to an office an hour after the assured's death and deliver them to a man she did not know, without inquiry as to his name and without taking any receipt therefor, that she would return only once and apparently never again make any search or inquiry or endeavor to find the papers there, is a recital which it would require a person indeed credulous to believe. Plaintiff's actions are likewise unbelievable, assuming that he had seen Mrs. Mulroy pay the premiums on the policies and

knew that he had a right to collect the insurance. Folks generally do not wait five years in order to urge the collection of sums due on life insurance policies. Verdicts based upon evidence so improbable and contradicted by credible evidence, are not permitted to stand.

The verdict and the judgment are manifestly against the weight of the evidence. The judgment is reversed and the cause is remanded.

REVERSED AND REMANDED.

O'Connor, P. J., and McCurdy, J., concur.

39813

WILLIAM CAPESIUS,
Appellant,

v.

WILLIAM B. MOULTON, DONALD S DIXON, RICHARD YATES HOFFMAN, GEORGE W. GORDON, HERBERT SLACK, FRANCIS E. PHELAN, ISABEL C. YOUNG and ROBERT L. ANDERSON,
Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

293 I.A. 630

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On August 8, 1937, the plaintiff in behalf of himself and other residents and taxpayers of the Village of Winnetka in Cook county, filed his bill of complaint against Moulton, president of the village, the trustees of the village, the superintendent of public works and F. Lynden Smith, Director of public works of the state of Illinois. The bill set up the enactment of the Motor Fuel Tax Law of 1929 with amendments (Ill. State Bar Stats. 1937, chap. 120, pars. 417-439); that there had been allotted to the Village moneys from this Motor Fuel Tax Fund in excess of $60,000, and that the Board of Trustees and other officials theretofore sought to obtain the approval of the State Department of Public Works and Buildings to the expenditure of these funds for purposes other than the construction or reconstruction of state highways because these highways within the village were then improved to their highest and best use; that the state department refused to approve ordinances or resolutions providing for the expenditure of these moneys unless same were used on the state highways; that the village officials May 11, 1937, acceded to these demands of the state department

and passed ordinances and resolutions in conformity therewith. The bill prayed that these ordinances and resolutions be declared unlawful and void and defendants enjoined and restrained from carrying out the same and from passing or purporting to pass similar resolutions or ordinances and from entering into any contracts for the construction or reconstruction of State Highway No. 42 in Winnetka, usually known as Sheridan road. The bill was filed without any order giving leave as required by the act of June 27, 1917 (see Ill. State Bar Stats., 1937, chap. 102, par. 11-17). September 7, 1937, plaintiff filed an amended or supplemental bill in which Lynden Smith, as director, etc., was not named a defendant. The amended bill made the same allegations and prayed the same relief as the original bill.

Defendants filed a motion to dismiss the amended bill. The motion was sustained. The motion of plaintiff for a temporary injunction was denied and the amended and supplemental bill dismissed for want of equity. From that decree plaintiff appeals.

Plaintiff's theory seems to be that the averments of the amended and supplemental complaint disclose an arbitrary, unnecessary and unreasonable exercise of the discretion of the defendant officials which equity will enjoin. Defendants contend that the suit may not be maintained without leave to file (which was not obtained); that Lynden Smith, director of Public Works, etc., who was a necessary party was not joined; that plaintiff is without standing to maintain the suit because the motor fuel tax fund is a state fund impressed with the specific trust, because the amended bill does not disclose damage to the plaintiff other and different from the damages which will be sustained by all taxpayers of the municipality (assuming the allegations of the bill to be true), because the statute gives preference to state highways and the legislature, by statute, expressly designated Sheridan road as a state highway (see Ill. State Bar Stats.,

1937, chap. 121, par. 274), and by reason of the express grant of power to the municipality the court may not, defendants say, set aside as unreasonable any ordinances passed in conformity with the power granted, because the allegations of the amended complaint are mere conclusions and the motives of the village officials may not be questioned.

The briefs cite most of the cases decided by the courts of Illinois concerning the rights of a taxpayer to have an injunction against the illegal expenditure of public funds. We consider only two of the points raised, either of which is controlling. Assuming that plaintiff is not precluded for the reasons urged to which authorities are cited by defendants, the amended complaint is, we hold, fatally defective for failure to join the Director of the Department of Public Works and Buildings of the State of Illinois as a party defendant. There can be no doubt from the averments of fact made in the amended bill that this department of the state government is vested with a very wide discretion in regard to the expenditure of the moneys derived from this tax. The statute expressly makes the expenditure of the money subject to the approval of the state department. It is apparent that the things concerning which the bill asks for an adjudication are matters in which the officials of the state department are very much interested and concerning which they have a right to be heard. The general rule in equity, as declared in numerous cases, is that every person having a substantial interest in the subject matter of the litigation must be made a party defendant. Schumacher v. Klitzing, 353 Ill. 530. The reply brief suggests that the bill discloses an action against joint tort feasors, and that it is not necessary to join all the tort feasors in one proceeding, but that in such an action plaintiff may sue any one of them as he may elect. That is,

of course, the general rule at law in tort actions. Here, however, it is apparent that the matters which this plaintiff seeks to litigate cannot be disposed of without making the director of the state department a defendant. We hold that the director was a necessary party. However, disregarding this defect of the amended bill we hold that the allegations of fact as stated therein are wholly unsufficient to disclose that the officials of the Village have abused their discretion in any way which would justify the intervention of a court of equity. The statute vests in these officials a wide discretion as to the use of these funds, and as was said in Mowry v. Department of Public Works, 345 Ill. 121: "When public officers are vested with discretionary power a court of equity will not interfere to control such discretion unless fraud, corruption, oppression or gross injustice is shown." To the same effect is Department of Public Works v. Challand, 348 Ill. 385.

The misuse of funds which the bill sets up is in particular that it is proposed to reconstruct, repave and resurface that part of Sheridan road "from the point where the same intersects Tower road, Winnetka, northward to the point where the same intersects Scott avenue, Glencoe, at the northerly limits and boundary of said Village of Winnetka." The bill avers that it is proposed to increase the width of their roadway from, as at present, to twenty-five feet to twenty-nine and one-half feet, remove the arch or crown, repave or resurface the roadway with concrete, place gutters and curbs on the edges and tilt the plane or base of the roadway toward the inside of the curves. The bill avers that the said highway between these points has been and is fully improved to its highest and best use, and that it would be and is impracticable, unnecessary and a gross misuse and waste of public funds to expend or use any funds or moneys for the further construction or reconstruction thereof; that this

portion of Sheridan Road, in its present condition, consists of a winding macadamized roadway continuing northward from Tower Road to the top of so-called Hubbard Hill, at which point the roadway descends into a ravine and continues to wind northward with numerous curves, gradually rising to a point approximately at the same height as that at the intersection of said Sheridan and Tower Roads; that this roadway has an approximate width of twenty to twenty-five feet and is arched or crowned at the center to a height of several inches above the elevation; that there are no gutters nor curbs along the edge of the roadway, the appearance of the roadway being similar to other macadamized roads without formal gutters or curbs; that the arch or crown of the roadway causes rain water and other moisture to flow rapidly off the said roadway to each side thereof where said moisture is effectively disposed of by a system of sewers or drains; that said roadway is more practicable and suited to the winding and hilly region in which it exists than any formal roadway with curbs and gutters could be; that the area traversed by said roadway is one of the famed natural beauty spots of the region, and Hubbard Hill and the winding roadway approaching it from each direction and the ravine known as Hubbard Ravine, through which said roadway runs, being widely and favorably known throughout Chicago and the State of Illinois for their natural scenic beauty; that by reason of state road markers marking Illinois' State Route No. 42 which are now and have been for many years placed along Sheridan Road, including this portion, the motor traffic upon the roadway has been and is extremely heavy; that a large percentage of the motor cars driven along this roadway, including this portion, are driven by motorists who are unfamiliar with the route and who are therefore following the 42 route markers of the State of Illinois; that such motor traffic along and over the highway is particularly heavy on Saturdays, Sundays and holidays between the period

from April 1 to November 1 in each year; that south of Tower Road Sheridan Road has been for many years improved with a flat concrete roadway approximately 29½ feet wide with concrete gutters and curbing, and that Sheridan Road from the intersection at Scott avenue is likewise similarly improved; that the color and appearance both to the south and to the north of that portion between said intersections at Tower Road and Scott avenue are wholly different from the portion between Tower Road and Scott avenue; that the concrete roadways are white in color and have formal curbing, whereas said macadamized roadway is black in color and has no formal curbing, and that as the motorists driving along said Sheridan Road from either direction cross the intersection of Scott avenue proceeding southward, and of Tower Road proceeding northward, said motorists necessarily are immediately aware of the different character of the said roadway and are placed on guard thereby; that by reason of the arch or crown of the macadamized roadway its relatively narrower width, its want of gutters and curbs, and its winding and hilly nature, motorists using said roadway have for many years and do now drive at moderate speeds near the center of said road so as to avoid its edges and necessarily proceed in single file without attempting to pass other vehicles ahead of them, until they have emerged from the portion of Sheridan Road between the intersections; that as a result of the foregoing and other factors said winding and hilly roadway has been and is now relatively free from danger to motorists using the same, and that the roadway is now and has been for more than 20 years wholly satisfactory and the best possible improvement thereof from both the viewpoint of the public using the same, the property owners adjoining said roadway and the taxpayers and residents of the Village of Winnetka; that the effect of the proposed improvements and reconstruction will be to increase immensely the speed and number of motor vehicles using the highway

and thereby render the same extremely dangerous to the motorists using the highway; that such reconstruction is impracticable, unnecessary and undesirable; that many motorists proceeding along this portion of Sheridan Road will not be aware that they are approaching a winding and hilly region and finding the roadway flat and tilted at the curves will proceed along said portion of Sheridan Road at a speed greatly in excess of the speed of motor traffic over the roadway at the present time; that signs are and have been proven an ineffective means to control speed or reduce congestion of motor traffic where the highway promotes or facilitates the same; that by reason of the proposed flattening of the arch of the roadway, the proposed increase in the width of the roadway, the proposed building of concrete gutters and curbs, and the proposed tilting of the roadway at the turns, instead of proceeding in single file the motorists using the roadway will attempt to pass other vehicles ahead of them on said curves and hills, thus greatly increasing the danger of injury to motorists and damage to said motor vehicles; that the danger to pedestrians proceeding along the edge of said road will likewise be increased for the same reasons; that the arch or crown in said existing roadway is the single greatest safety factor thereof because it effectively reduces the speed of motor traffic thereon and prevents dangerous passing on the curves thereof; that no other means except an arch or crown similar to the arch or crown in said existing roadway is or can be so effective in preventing accidents on the highway, and that if the arch or crown is removed, the highway straightened, the roadway flattened and widened, and the number and speed of motor vehicles increased thereby, the increase in the dangers from the use of the road will be so great as to require at a later date further construction and reconstruction of the roadway; that such changes in said highway will impair and destroy the scenic beauty and attractiveness of

Hubbard Hill and Hubbard Ravine, regardless of what steps may be taken to prevent it; that the so-called reconstruction and improvement of the roadway in the manner contemplated by the Department of Public Works will greatly reduce and impair the assessed value of adjoining property and reduce the taxes received therefrom by the Village of Winnetka, County of Cook and State of Illinois, thereby increasing the taxes to be paid by the plaintiff and other taxpayers.

It is apparent from these averments of the bill that the differences between these parties grow out of their diverse opinions as to whether the proposed improvement would be in fact wise and a benefit to the community. The decision of that question requires the opinion of experts who, however sincere and competent, might not be able to agree. We have no right to presume that the experts of the State Department and the city officials are less competent than plaintiff or that the officers of the City of Winnetka are lacking in qualifications required by the positions which they have been elected to fill. The case presented by the amended bill is clearly one in which a court of equity is asked to interfere with and control the discretion of these officials, and at the suit of a single individual who avers his knowledge of aesthetics and engineering problems to be superior to that of the officials to whom the Legislature of the state and the voters of the village have confided the direction and management of these affairs. The Legislature has expressly designated Sheridan Road as a state highway. Illinois State Bar Stats., 1937, chap. 121, par. 274. The amended bill does not allege fraud nor does it allege oppression except by way of mere conclusion and epithet. It utterly fails to point out any violation of the rights of plaintiff or anybody else under the statute. Therefore, because of the of the non-joinder of a necessary party and because (assuming the standing of plaintiff to maintain the suit) the amended bill fails to set up facts showing plaintiff is entitled to relief in a court of equity, the decree is affirmed.

AFFIRMED.

O'Connor, P. J., and McSurely, J., concur.

39546

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
(Cross-Complainant) Appellant,

vs.

CLARENCE E. BECK et al.,
(Cross-Defendants) Appellees.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This appeal involves the valuation as of May 8, 1925, of certain lots in block 142 owned by the Board of Education of the City of Chicago, which values are to be the bases of the rentals of tenants of the Board. The Board appeals from the final decree and the tenants filed notice of cross-appeals.

Title to block 142, School Section Addition to Chicago, is in the City of Chicago, in trust for the use of schools; the block is bounded on the east by State street, on the west by Dearborn, on the north by Madison and on the south by Monroe street. Commencing May 8, 1880, the Board made 50 year leases of lots in this block to various tenants; the leases were substantially uniform in terms and provided that for the purpose of ascertaining the rent to be paid for each five year period after May 8, 1885, an appraisement should be made of the true cash value of the premises, exclusive of the improvements, by three appraisers; rental to be 6 per cent of the valuation so fixed.

Litigation ensued over the 1885 appraisal; after litigation lasting some years a compromise was effected resulting in the execution of supplemental leases of 1888; by these leases the revaluation period was changed from five to ten years, the expiration period was extended to May 8, 1985, and the method of appointing the appraisers was changed. Under these leases of 1888 appraisals were made in 1895, 1905, 1915 and 1925. Each of these appraisals was attacked by some

of the interested parties, but in each instance except 1925 the appraisal was sustained. Board of Education v. Frank, 64 Ill. App. 367; Sebree v. Board of Education, 166 Ill. App. 276; 254 Ill. 438; and Collins v. McVickers Theater Co., 207 Ill. App. 240.

The 1925 appraisal was attacked and suits were filed by tenants asking that the Board be enjoined from attempting to collect a larger sum as rental during the ten year period from May 8, 1925, to May 8, 1935, than the amounts fixed by the 1915 appraisal.

The cases were heard by a master in chancery, who sustained the appraisals, and a decree was entered in the Superior court in conformity with the master's recommendations; a consolidated appeal was taken from this decree to the Supreme Court. Union Trust Co. v. Board of Education, 348 Ill. 256. The appointment of the appraisers was challenged, but the Supreme court held they were properly appointed. The Supreme court, however, reversed the decree on the ground that the appraisers had erroneously considered the tax-exempt feature of the lands as an element of market value, and the cause was remanded to the Superior court with directions to hear evidence and determine the true cash value of the leased lands as of May 8, 1925.

Pursuant to the mandate of the Supreme court the Board filed cross-bills of complaint asking the court to determine the true cash value of the leased lots and to order the tenants to pay the rentals thus fixed from May 8, 1925, to May 8, 1935; answers were filed by the tenants and the causes were again referred to a master.

Eight of the cases were consolidated for hearing before the master; objections and exceptions to the master's report were filed by the Board challenging his conclusions as to the values of the lots involved; the chancellor sustained some of the exceptions to the report and entered the decrees from which the instant appeals were taken.

Of the cases heard before the master only three are now here on appeal. They involve lot 3, of which the tenant is Clarence E. Beck, lot 7, tenant Lacey Securities Company, and lot 8, tenants Rosalie Cavanna and Sarah Bezark, and lots 31 and 32, all in block 142. While the appeals pertaining to these lots have been docketed in this court as separate appeals, they have been consolidated for hearing and but one brief has been filed on behalf of the respective parties, and we shall consider all these lots in this opinion.

The subtenants of lots 31 and 32 in block 142 did not file suits attacking the 1925 appraisal, but by agreement the Board recognized that they were entitled to have their rent the same as the rental for lots 7 and 8, which are of the same character and location. It was agreed that a final determination of the values as of May 8, 1925, of lots 7 and 8 would be determinative of the values as of that date of lots 31 and 32. Accordingly a supplemental decree was entered in the Cavanna case, finding the value of lots 31 and 32 in the same amounts as the decree found the value of lots 7 and 8 respectively, the Board reserving to itself the right to assign all errors as to the findings as to lots 7 and 8, also against the findings as to lots 31 and 32.

Each lot is an inside lot on the west side of State street, between Madison and Monroe streets, with a frontage of 24 feet on State street and a depth of 120 feet to a 15 foot alley at the rear; on May 8, 1925, each lot was improved with an old six or seven story building, with store rooms on the first floor; lot 3 is 48 feet south of the corner of Madison and State streets; the north line of lot 7 is 72 feet south of lot 3, separated therefrom by lots 4, 5 and 6; lot 8 adjoins lot 7 on the south, with a 15 foot alley on its south; lot 31 is across this alley to the south and is in all respects similar to lot 8; and lot 32 next south of lot 31, is a

duplicate of lot 7.

The decree appealed from found the cash value May 3, 1925, of lot 3 to be $448,680, or approximately $155 a square foot; the value of lot 7 was found to be $427,450, or a value of $148 a square foot; and lot 8 was valued at $448,680, or $155 a square foot. The Board, appealing, says that the chancellor did not give sufficient consideration to the testimony of witnesses for the board or to the relevant sales and leases of similar property on State street, and also erroneously deducted 20 per cent from the value of the lots because of the so-called devaluating effect of the terms of the leases, especially the provision for revaluation every ten years. The chancellor increased the values fixed by the master by about 9 per cent, and the tenants, cross-appealing, ask that the master's report be sustained in full.

A large part of the record is composed of the testimony of six real estate experts - J. Milton Trainer, John P. Hooker and Frederick J. Tucker testifying for the Board, and Arthur B. Hall, Graham P. Aldis and Gilbert H. Scribner testifying for the tenants. The opinion of the Board's witnesses respectively gave the value of lot 3 from $576,000 to $604,800; on the basis of the smaller value this is $200 a square foot. Lot 7, valued at $576,000 or $200 a square foot; lot 8 from $604,800 to $648,000; the smaller amount is at the rate of $210 a square foot.

The opinion of the tenants' three witnesses respectively placed the value on lot 3 from $399,168 to $411,264; the larger amount is at the rate of $143 a square foot. Lot 7 from $380,160 to $391,680; the larger figure is at the rate of $136 a square foot. Lot 8 from $399,168 to $411,264; the larger amount is at the rate of $143 a square foot.

It is noticeable that these opinion witnesses differ more than $200,000 as to values. This wide divergence gives impressive-

ness to the rule that opinions as to real estate values are valuable only to the extent to which they are supported by facts, (City of Chicago v. Lord, 276 Ill. 544, 551) and evidence of sales and leases must relate to land substantially similar in character, location and improvements to the land being valued. (Aledo Terminal Ry. Co. v. Butler, 246 Ill. 406, 409. A lot, to be similar to lots 3, 7 or 8, in block 142, is an inside lot on State street in the immediate vicinity, approximately the same size and similar character, which means land used or capable of use for the same general purpose. Forest Preserve Dist. v. Caraner, 299 Ill. 11, 14. These and other cases make it our duty, in considering the transactions appearing in evidence, to distinguish between those involving property similar in character and location to lots 3, 7 and 8 and those transactions which did not.

The Board introduced a number of transactions said to be relevant and of assistance in establishing the value of the lots in question. One of these involved lots 31 and 32 in block 142; these lots are the same size and similarly located as are lots 7 and 8 and separated from them by the fifteen foot alley; September, 1923, Stumer, Rosenthal & Eckstein were the lessees from the Board of lots 31 and 32; they made a sublease on September 19, 1923, of these lots to the S. S. Kresge Company, effective May 8, 1925, for a term expiring May 4, 1985; by the terms of the sublease the Kresge Company paid to Stumer, Rosenthal & Eckstein $100,000 in cash and agreed to pay an additional rental of $30,000 a year over and above any amount required to be paid to the Board, and the sublessee assumed all of the first lessee's obligations under the lease from the Board; at this time lots 31 and 32 were improved with old buildings, substantially like the old buildings on adjacent lots 7 and 8; the sublease required the Kresge Company to wreck these buildings and erect

[illegible]

[illegible] Chicago. Lord, [illegible]

[illegible]

[illegible] Ry. [illegible] Water, [illegible]

lots 3, 7 or 9, in those [illegible]

the impediments [illegible]

or water, [illegible]

ground [illegible]

These and other [illegible]

time [illegible]

property [illegible]

those transactions [illegible]

The court introduced [illegible]

relevant and [illegible]

question. [illegible]

lots are [illegible]

separated from [illegible]

street, [illegible]

31 and 32; [illegible]

to the [illegible]

piling May 4, 1893; [illegible]

paid to [illegible]

pay on [illegible] 60,000 [illegible] any amount

required to be [illegible]

the first [illegible]

at this time lots 31 and 32 were [illegible]

stantially like the [illegible]

lease required the [illegible]

a new building within a certain time.

Assuming that the rental to be paid by the lessees Stumer, Rosenthal & Eckstein on the ten year period beginning May 8, 1925, would be the same as fixed by the 1915 appraisal, and capitalizing this and the additional rental under the sublease at 6 per cent, the valuation indicated by the transaction would be $218.16 a square foot; capitalized at 5 per cent, the prevailing rate for 99 year leases after 1912, would be $230.06 a square foot. The tenants say that this additional rental was solely because the land was tax exempt. There was no evidence that this entered into the transaction. The $100,000 cash could not have been paid for the old buildings as these were to be torn down. The Kresge company, a responsible organization, was willing to pay for a period of sixty years on a minimum valuation of over $218 a square foot, evidently being of the opinion that the earning power of the land justified the price paid. This transaction meets the definition of the fair cash value of the property, which has been stated many times, as what property will bring at a voluntary sale where the owner is ready, willing and able to sell but not compelled to do so, and the buyer is ready, willing and able to buy but is not forced to do so. The People v. Wilson, 367 Ill. 494.

We regard this Kresge transaction as of decisive importance. It contains all the necessary factors of similarity of size, location, character and improvements. Both parties introduced evidence of other transactions but none of them is comparable in importance with the Kresge transaction.

The Board introduced evidence of a sale of an inside lot on the east side of State street in the block between Madison and Washington streets, which is the block north of block 142; this was sold in December, 1911, at a price of $277 a square foot. An adjoining inside lot to the south was leased for 99 years at a rental which,

capitalized, gives a value of $208 a square foot. These lots are not the same size as the lots in block 142, and the witnesses applied what is called the Assessor's Depth Factor or Formula, to estimate their value if they were the same size as the lots in block 142. This gives the value of the property sold, at $254.13 a square foot, and of the leased property, $226.33 a square foot.

The so-called Assessor's Depth Factor or Formula is a method of valuing inside lots of different dimensions. An arbitrary value is given by the assessor to an imaginary lot one foot in width and 100 feet deep. From this as a standard a proportionate increase or decrease in value is given to lots of greater or less dimensions. The formula does not give real values but only a hypothetical base from which to estimate the relative values of lots of different dimensions. All the expert witnesses seem to agree that the use of this method is fair and gives uniformity.

The Board introduced evidence of a lease of two inside lots facing west on State street in the block immediately north of block 142 at a rental which, applying the assessor's formula, gives a value of $232.83 a square foot. An inside lot at 114 South State street was leased in 1911, which leasehold was afterward sold at a square foot value of $198. Adjoining this lot was another lease, made in 1912, which leasehold was subsequently sold for an amount which capitalized gives a value to the lot, according to one witness, of $209.95 a square foot, and, according to another, of $196.62. 120 South State street, an inside lot, was leased in 1902 for 99 years; there was in evidence an offer to purchase this leasehold for an amount which would indicate the value of the property in 1923 as $225 a square foot. These last three transactions are on the west side of State street immediately south of block 142. Also the sale of the Columbus Memorial property, land and building located at the southeast corner of Washington and State streets, facing 99 feet on

State street and 90 feet on Washington, one block from block 142. There is much discussion as to the value of this corner. One estimate gives a value of $302.91 a square foot, whereas the tenants claim a value of $192.30. The expert witnesses disagreed as to the method of arriving at the square foot value, and in our judgment it is not sufficiently decisive to require an analysis and determination by this court.

Evidence of at least twelve transactions was introduced by the Board showing leases or sales of inside lots on State street, within a block or two of the lots in question, at values running from $136.94 a square foot to one, at 35 South State street, at $239 a square foot.

The tenants introduced evidence of a sale of the Roosevelt Theater property, which is in the second block north of block 142, fronting east, a large parcel of land sold in 1920 at a value of $121.21 a square foot. The tenants also introduced evidence of a sale in 1924 at the southwest corner of State and Randolph streets at $72.74 a square foot; of leases of tracts on which the Marshall Field store stands, on State street between Randolph and Washington streets, at an estimated value of $162.45 a square foot; sale in 1922 of the northeast corner of State and Randolph at an estimated value of $132.96 a square foot. The tenants introduced evidence of other leases at various points on State street in the six blocks running from Lake street on the north to Jackson on the south. None of these is controlling, although they may be helpful as indicating the difference in values along State street.

Counsel for the tenants seem to rely largely on what is called the Assessor's Tables, which were adopted by the Assessor of Cook county in 1928 to aid him in determining, for tax purposes, the values of real estate; also the so-called Olcott's Blue Book, a compilation by Mr. Olcott of some fifty thousand blocks in the

city of Chicago. Neither the Assessor's tables nor the Olcott Blue Book was competent evidence and should not have been considered in fixing values. Apparently they were introduced for showing valuations in which the Board's witness, Hooker, participated when he was a deputy assessor. And it is argued on behalf of the tenants that the valuations shown by these documents establish and support the valuations made by the tenants' witnesses. It is the settled rule that in such proceedings the assessor's values of real estate are not admissible as evidence of the market value. The People v. Stevens, 358 Ill. 391, 406; The People v. Bain, 359 Ill. 455, 480.

The transaction nearest in location to the lots in question involved lots 1 and 2 in block 142, which is the southwest corner of Madison and State streets; these lots adjoin lot 3 on the north; in 1901 they were leased for 99 years and in 1920 the leasehold and building were sold for a consideration which Mr. Trainer, one of the witnesses for the Board, estimated at $403.05 a square foot. Mr. Tucker, another of the Board's witnesses, who was especially familiar with this transaction, estimated that this sale was based on a square foot value of the real estate of $350. Apparently the trial court adopted Mr. Tucker's estimate, but arrived at a much lower figure by applying the Assessor's Formula for reducing the value of corner property to the valuation for an inside parcel. There is no definite explanation of this formula, which was adopted by the Assessor of Cook county in 1928 to aid him in determining the corner values for tax purposes. This formula apparently applies equally to all corners, and obviously is inapplicable to the corner of State and Madison streets, perhaps the busiest corner in the city. Moreover, there was no evidence that the assessor's tables, designed to aid in determining corner taxes, are correct. It also appears that there are various tables used for this purpose, and

lot

there is difference of opinion as to which should be used. Mr. Scribner, one of the tenants' expert witnesses, said that he had never used the assessor's tables to arrive at corner values, and that the general method used by all real estate men was to figure a corner worth anywhere from one-third to one-half more than inside property, depending on location. Mr. Scribner very properly added that "different property and different corners differ." As we have indicated, the application of the assessor's formula or tables in valuing corner properties was not justified. The sale of the leasehold and building on lots 1 and 2 in block 142 should be figured on the basis of approximately $350 a square foot.

All the witnesses were in substantial agreement that the land values for the period from 1910 to 1929 increased. One witness said 62 per cent, and that rents increased 80 per cent. According to two witnesses for the tenants the store rentals on State street from 1919 to 1925 increased from 50 to 100 per cent. During this time there was a very active market for real estate, with many sales and leases. The State street frontage of block 142 is in the very heart of the retail district, and that section is in about the center of values on State street. Some of the witnesses placed a higher value on State street lots in block 142 than on any other property on either side of State street. This condition gives great weight to the Kresge transaction as indicating that it was not a freak or abnormal transaction, but was in harmony with the prevailing conditions in the real estate market at that time in this district. It also indicates how comparatively little weight can be given to transactions in other locations and at other times.

There is point in the suggestion of counsel for the Board that despite the unparalleled advance in real estate values at this place during the decade preceding May, 1925, the tenants' witnesses

valued the lots in question as having increased only from 15 to 25 per cent over the values established by the 1915 appraisal, and that since the 1915 appraisal was substantially the same as the appraisal of 1905 the tenants' witnesses would have the court believe that there was a total maximum increase in values of 25 per cent for the twenty years from 1905 to 1925, although it was undisputed that values and rentals in the State street district during this time had at least doubled in value.

The theory of the tenants seems to be that the court in fixing the value on May 8, 1925, could consider this as a "boom" period and should also consider the drastic decline in values which began in 1929 and 1930. This theory is untenable. How much the property was worth on May 8, 1925, was the only question to be determined. Subsequent conditions and experiences should not be considered. The testimony of many of the tenants' witnesses suggests that their opinions of values were based on hindsight instead of their knowledge and recollection of the actual conditions in the real estate market on May 8, 1925. This, of course, does not give a true basis for an opinion as to values in 1925.

The trial court accepted the argument on behalf of the tenants that the cash value of the land was depreciated because of the ten year revaluation clause contained in the leases, and because of this deducted 20 per cent from the amount which the tenants' witnesses gave as the value.

The tenants apparently argue that it has been decided, as a matter of law, that the lease depreciates the value. The cases cited do not support this. Sebree v. Board of Education, 254 Ill. 438, simply held, among other things, that the appraisers had the right to consider the provisions in the lease and any other facts or information bearing upon the question in determining the fair cash value of the land. The opinion notes (p. 461) "that ex-

perienced men differ as to the effect of leasehold interests of this character on the value of land." In Collins v. McVickers Theater Co., 207 Ill. App. 240, the court also held that the appraisers had the right, in valuing the land, to take into consideration the revaluation clause in the lease. In Springer v. Borden, 210 Ill. 518, involving a lease for a rental of 5 per cent of the cash value of the demised premises, it was held that all the evidence as to the effect of the lease on the value of the premises was immaterial and incompetent. Moreover, it would seem to be self-evident that the effect of the revaluation clause in the leases would be a question of fact. It would only be a question of law if all reasonable minds would agree, and the record before us shows a sharp disagreement of the witnesses on this question.

Was the trial court justified in depreciating the value of the land 20 per cent because of the revaluation leases? The only basis in the record for putting the depreciation at 20 per cent is the opinion of certain witnesses for the tenants. These opinions were not based on any facts, and no examples of sales of fees subject to revaluation leases were cited by either side. Mr. Hall, one of the experts for the tenants said that he had no precedents on which to base his opinion as to the extent of the devaluation. Mr. Aldis, another expert witness for the tenants, testified that he "picked that 20 per cent out of clear reasoning." Mr. Scribner, the third expert witness for the tenants, testified - "There is no mathematical way to arrive at this (25 per cent) figure;" that this was more or less arbitrary, depending upon the particular view of the man expressing his opinion; that it could not be tied up with proof. Other witnesses for the tenants expressed similar views, - that it was all a matter of judgment - which was an euphonious way of saying that it was all a matter of guess.

On the other hand, the witnesses for the Board testified that the revaluation clause did not depreciate the value of the land. The tenants argue that the leases depreciated the land for various reasons. One, that the leases have no provision for security to the lessor. Apparently this means that because of the revaluation clause the tenants will not improve the land with the construction of tall buildings, or what are known as skyscrapers, which would give the lessor security for the rent. To this it may be answered that the history of almost all skyscrapers in and about the loop district is one of disaster; that the land in block 142 is in such demand that the lessor does not need the security of a modern building to ensure the payment of rent. Three of the eight revaluation leased lots are already adequately improved with modern buildings. The tenants say that the lessees can assign the leases when not in default and thereby be relieved of personal liability. The same might be said of every modern 99 year lease, and there is no evidence that the right of assignment of the instant leases has worked to the disadvantage of the Board. Generally, the assignees have been stronger financially than the original lessees. The tenants say that ordinary fee buyers, such as estates and wealthy investors, would not buy such fees because of the uncertainties of the amount of return over the entire period of the lease. If merchants and storekeepers will pay substantial prices for locations in block 142, it is unimportant as to what another class of buyers might pay. Moreover, considering that the usual 99 year lease produces around 4 per cent and these leases produce 6 per cent, it is mere assumption that investors would not purchase these fees. The record shows that they have never been offered on the market, probably for the reason that they produce a superior income to that of the ordinary lease without a revaluation clause.

The tenants say that the options given to the lessees at the termination of the lease are burdensome to the lessor. The leases provide that at expiration the tenant may have a renewal for such further term as the lessor may determine. This certainly is no hardship on the lessor. There are also provisions that if the lessor should sell the premises the tenant has the option to purchase at a price fixed by appraisal. We find no hardship to the lessor in this. Moreover, a similar provision is contained in many 99 year leases. It is said that the leases are burdensome to the lessees as not permitting permanent improvements and therefore full development of the leasehold estate, and that this is disadvantageous to the lessor. There is no provision in the leases which prevents the lessee from borrowing on the leasehold and constructing modern buildings. Some of the tenants have already done so and their lands are improved to the best and highest use. It is said that the revaluation clause provokes litigation. Such litigation is possible in any lease containing a revaluation clause. It would hardly seem proper for the tenants, who have instigated litigation, to use this situation created by themselves as an argument to lower the value of the land. In the light of these considerations we cannot give approval to the reasoning of the tenants as to the effect of the leases upon the real estate values. The reasons rest more in speculations and theories than on facts. The history of block 142, as shown in the various cases in court, disproves any claim of disadvantage which would discourage a purchaser of the fee. Apparently for the last fifty years all the tenants except a very small number have paid their rent, many of them have improved the land by erecting substantial buildings and many others have sold their leaseholds at a large increase.

We are of the opinion that the testimony of the witnesses for the Board is more convincing as to the effect of the revaluation

clause. As one of the witnesses expressed it, the fee owner gets 6 per cent on his money, and if ten years roll around and the property is more valuable he will get more rent, and since over a long period of years the central business district has risen in value the probabilities are that there would be an increase of rent. There was a statement by one witness that persons making short leases have eventually been able to make better leases than those who make long term leases. There were in evidence many instances of long term leases with fixed rentals where the rents were not paid. Another witness testified that in his opinion more people would be interested in these fees with the revaluation clause than would be interested in the fee on a fixed rental. The witnesses for the Board gave in much detail their reasons for holding the opinion that the revaluation clause did not depreciate the value of the fee. The bedrock reason was the 6 per cent rental and the probabilities of a continued growth in real estate values in this district. Also should be considered, in this connection, the many merchants desiring small storerooms in a prominent location.

We hold that the more persuasive evidence leads to the conclusion that the leases do not depreciate the value of the fee, and also that the arbitrary figure of 20 per cent depreciation, found by the trial court, was wholly without any basis in fact.

After considering the evidence and arguments of counsel the conclusion is inescapable that the Kresge transaction, which was on the basis of $218.16 a square foot, is the most convincing factor presented by which to evaluate the lots under consideration.

Addressing ourselves to lot 3, tenanted by Clarence E. Beck et al: Five of the six expert witnesses testifying for both parties gave to lot 3 a 5 per cent differential because of its proximity to Madison street. Upon this basis we are of the opinion

that the best supported evidence fixes its value at $604,800, which is at the rate of $210 a square foot. The decree of the superior court fixed the value of this lot at $448,600, or approximately $155 a square foot.

For the reasons indicated this decree is reversed and the cause is remanded with directions to enter a decree finding the fair cash value of lot 6, block 142, in School Section Addition to Chicago, as of May 8, 1925, to be $604,800.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.

39547

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
(Cross-Complainant) Appellant,

vs.

MACEY SECURITIES COMPANY, a Corporation,
(Cross-Defendant) Appellee.

APPEAL FROM SUPERIOR COURT OF COOK COUNTY.

293 I.A. 631

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This appeal involves lot 7, block 142, in School Section Addition to Chicago. The decree of the Superior court valued this lot at $427,450, or $148 a square foot.

For the reasons stated in our opinion this day filed in Board of Education v. Clarence E. Beck et al., No. 39546, we hold the record shows this valuation to be inadequate. We are of the opinion that the evidence shows that lot 7, on May 8, 1925, was worth $576,000, which is on the basis of $200 a square foot. The decree of the Superior court is reversed and the cause is remanded with directions to enter a decree fixing the fair cash value of lot 7, block 142, in School Section Addition to Chicago, as of May 8, 1925, at $576,000.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J. , and Matchett, J., concur.

39548

BOARD OF EDUCATION OF THE CITY OF CHICAGO,
(Cross-Complainant) Appellant,

vs.

ROSALIE CAVANNA and SARAH SEZARA, (Cross-Defendants) and BLANCHE S. GIDDENS et al., (Intervening Petitioners),

Appellees.

4/2/A

293 I.A. 631

MR. JUSTICE McSURELY DELIVERED THE OPINION OF THE COURT.

This appeal involves lot 8, block 142, in School Section Addition to Chicago. The decree of the Superior court fixed its value, as of May 8, 1925, at $415,680, or at the rate of $155 a square foot. It should be remembered that the acreage transaction, involving property separated from lot 8 by a fifteen foot alley, was on the basis of $218 a square foot.

For the reasons indicated in our opinion filed this day in Board of Education v. Clarence . Peck et al., No. 39546, we hold the record shows this valuation to be inadequate; that the most convincing evidence supports a valuation of $604,800, which is at the rate of $210 a square foot. The decree and supplemental decree of the Superior court are reversed and the cause is remanded with directions to enter a decree finding the value of lot 8, block 142, in School Section Addition to Chicago, as of May 8, 1925, to be $604,800, and of lot 31 to be $604,800, and of lot 32 to be $576,000.

REVERSED AND REMANDED WITH DIRECTIONS.

O'Connor, P. J., and Matchett, J., concur.

39502

SAMUEL MONTGOMERY,

(Plaintiff) Appellant,

v.

THE FIRST NATIONAL BANK OF CHICAGO, a corporation, et al.,

(Defendants) Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

43A

293 I.A. 631

FEB 2 1938

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiff appeals from a judgment entered by the court dismissing plaintiff's complaint for want of equity upon motion of certain of the defendants.

In the original complaint, plaintiff prayed for the setting aside of a certain trust agreement executed by plaintiff's wife, now deceased, wherein the defendant The First National Bank of Chicago, a corporation, was appointed trustee, and whereby the income therefrom was payable jointly to the plaintiff and his wife during their lifetime and to the survivor of them, and thereafter the principal thereof to designated beneficiaries. It was also provided that said trust was revocable by plaintiff's wife, the creator thereof in her lifetime. The plaintiff also prayed for an order upon The First National Bank of Chicago, trustee, for an accounting. To this bill of complaint the defendant trustee filed its answer, and the other defendants, Henry O. Philips, Nicholas D. Fratt, Mrs. Charles D. Fratt, Jr., E. H. O'Neil, Mrs. Charles E. De La Vergue, Norbert O. Fratt, Fred W. Fratt, and Charles Fratt, filed a motion to dismiss the bill of complaint. This motion of the defendants herein named to dismiss the complaint was sustained by the court. During the pendency of the proceedings had upon the motion to dismiss said complaint, plaintiff caused a substitution of the present counsel to be made. Before the court entered its order sustaining the motion of said named defendants to dismiss the original

complaint, plaintiff asked leave to file his amended complaint. The court denied the motion of the plaintiff, and over the objections of the plaintiff, entered the order and judgment of the court dismissing the bill of complaint for want of equity with costs against the plaintiff.

Thereafter, within the term time, the plaintiff renewed his motion for leave to file his amended complaint, together with an affidavit in support thereof, which motion was subsequently denied.

From the record it appears that an affidavit to file said amended complaint bears the court's filing stamp thereon, but the amended complaint was not permitted by the court to become a part of the record in the cause.

The question here for consideration is whether the court was justified in dismissing the bill of complaint as to the defendant trustee upon the motion of certain defendants after the defendant trustee had filed an answer to the bill.

It is contended by the plaintiff in this action that the defendant trustee did not join with the other defendants in the motion to dismiss the complaint for want of equity after having filed its answer to the complaint, and that the order was erroneous in dismissing the bill of complaint as to this defendant, and suggests that this is particularly so since the original bill of complaint prayed for an accounting as well as for an order to set aside the trust agreement.

The only answer made by this defendant is that at the time the other defendants made a motion to dismiss the complaint, the defendant trustee had answered. The defendant's answer included the defense of laches, which had the same effect as if it had been raised by motion. The complaint being vulnerable to a motion to dismiss, it was properly dismissed as to all the defendants. It must be co that upon this record even if the court upon a hearing wer

in dismissing the bill for laches, still the plaintiff would be entitled to an accounting and have the court determine what was due him under the terms of the trust agreement, now the subject of this controversy. It appears from the record that the defendant trustee did not join with the other defendants in the motion to dismiss the bill of complaint for want of equity on the ground that from the face of the bill the plaintiff was guilty of laches.

It is to be noted that the bill of complaint was verified, and it was within the discretion of the court, in considering the motion of these certain defendants, to determine whether the plaintiff after enjoying the income from the trust estate for a period of nine years could amend this verified bill to show that he was not guilty of laches.

In view of our conclusion, the order of dismissal for want of equity as to the named defendants is sustained, and reversed and remanded as to The First National Bank, Trustee, with directions that the court proceed to consider, upon a hearing, the rights of the plaintiff and the defendant trustee upon the issues joined.

Other objections have been called to our attention, but under the circumstances we believe it will not be necessary to consider them.

AFFIRMED IN PART AND REVERSED
AND REMANDED IN PART.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39517

HARRY GOLDSTINE REALTY CO., a corporation, Assignee of HARRY GOLDSTINE,

(Plaintiff) Appellant,

v.

EDGAR ORILLY and GEORGE ORILLY,

(Defendants) Appellees.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

293 I.A. 631

FEB 2 1938

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This appeal is by the plaintiff Harry Goldstine Realty Company, from a judgment for the defendants entered in the Municipal Court of Chicago.

Plaintiff filed its statement of claim as assignee of Harry Goldstine and seeks to recover $4,800.51, due under a contract alleged to have been entered into by and between Harry Goldstine and the defendants, through Samuel A. and Leonard B. Ettelson as defendants' agents and attorneys, to appraise for the defendants certain real estate and improvements in which they had an interest, known as the Orilly Building located in Chicago, Illinois. The fee to this real estate was in the Board of Education of the City of Chicago, and under the terms of the lease with the tenant of the building a revaluation was necessary to determine the rental to be paid by the lessee to the Board of Education. Litigation concerning the valuation was pending in the Superior Court of Cook County, and Harry Goldstine was engaged by the defendants' attorneys at $100 per day, plus a retainer's fee, to prepare the appraisal, give his testimony in court and assist defendants' attorneys at the hearings in court.

In the amended defense to the statement of claim the defendants alleged, among other things, that if any agreement was made with Harry Goldstine with reference to his appraisal work, it was made not on their behalf personally, but on behalf of George Snyder

Crilly, Edgar Crilly and Frank Lloyd Crilly, executors and trustees under the last will and testament of Daniel P. Crilly, deceased, and that if there was any money due Harry Goldstine or his assignee, it was not due from the defendants personally, but from them as executors and trustees.

The defendants admit that there was due Goldstine the sum of $300.51, but not from the defendants personally, but as trustees under the last will and testament of Daniel P. Crilly, deceased.

The cause was submitted to the court, and upon a hearing, judgment was entered for the defendants for costs, from which judgment the plaintiff appeals.

From the facts as they appear in the record, the Board of Education of the City of Chicago was the owner of the fee to the real estate and improvements commonly known as the Crilly Building, at 35 South Dearborn Street, Chicago, Illinois. In January, 1934, there was litigation pending in the Superior Court of Cook County relative to the revaluation of the Crilly Building for the purpose of fixing the rental due the Board of Education from the lessee.

Harry Goldstine, Samuel A. Ettelson and Edward C. Higgins testified in the instant case on behalf of the plaintiff. It appears from their evidence that the law firm of Samuel A. and Leonard S. Ettelson was representing the Crillys in the School Board litigation; that upon the recommendation of Samuel A. Ettelson, George and Edgar Crilly authorized him to engage Harry Goldstine, Gilbert Scribner and Francis Manierre as real estate experts to appraise the Crilly Building on behalf of the Crillys, and the appraisers were authorized to represent other lessees; that the rate of compensation was to be a retainer of $2,500 for the three experts, and $100 per day for each day of attendance at the trial of the case.

The several hearings were continued until about March 9, 1934, when there was a division of interest between the Crillys and

other School Board lessees in the litigation. Samuel Ettelson thereupon recommended to Edgar Crilly and Crilly accepted the recommendation, that Goldstine continue to represent the Crilly property alone and that he (Goldstine) was to receive a fee of $100 a day to be paid by the Crillys for actual attendance in court, help counsel to examine and cross-examine the witnesses and testify in court, as the case might require. There was a dispute between the parties as to whether Goldstine was to receive compensation for the preparation of the case in his office, but the parties agreed that Goldstine was in court 37 days after March 3, 1934, some being half days and some being full days.

Edgar Crilly and George Crilly testified in their own behalf and stated that they were acting as executors and trustees under the will of their father, Daniel F. Crilly, deceased.

Edgar Crilly testified that the basis of the contract between the Crillys and Goldstine was a long distance telephone conversation with Leonard Ettelson, and that Ettelson was authorized to engage Harry Goldstine and two other experts on behalf of himself and his brother George as executors and trustees under the will of their father. Certain exhibits were introduced in evidence by the defendants, which were admitted over the objection of the plaintiff to establish that he and his brother George were acting as executors and trustees of the estate of Daniel F. Crilly, deceased. These exhibits which were objected to were:

"1. The bill of complaint entitled 'George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, as Executors and Trustees of the Estate of Daniel F. Crilly vs. Board of Education of the City of Chicago.'

2. The following portion of the final decree as entered in this cause:

> 'That the fees of Sidney S. Pollack, as Master in Chancery to whom said cause was referred, be and the same hereby are fixed at the sum of $3,375. and said cross-defendants, George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, as executors and trustees of

the Estate of Daniel F. Crilly, Deceased, be and they hereby are ordered and directed to pay to said Master in Chancery the sum of $1,687.50, being one-half of said fees so fixed.'

3. A check dated February 13, 1934, payable to Harry Goldstine, in the sum of $847.35, covering his portion of retainer, drawn by D. F. Crilly and Company, the name under which the trust is operated.

4. A bill by Samuel A. & Leonard B. Ettelson under date of November 19, 1934, to George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, as Executors and Trustees of the Estate of Daniel F. Crilly, Deceased, for cash advanced by the Ettelsons.

5. A statement for services from Mr. Manierre, a party to the contract with Mr. Goldstine, under date of June 7, 1934, to George Snyder Crilly, Frank Lloyd Crilly, Edgar Crilly, Executors and Trustees of Estate of Daniel F. Crilly, Deceased.

6. A letter and statement for services under date of January 9, 1935, by Mr. Scribner, a party to the contract, to George Snyder Crilly, Frank Lloyd Crilly and Edgar Crilly, as Executors and Trustees of the Estate of Daniel F. Crilly, Deceased."

From an examination of these exhibits which were admitted in evidence for the purpose of establishing that the contract involved in this litigation was a contract with the defendants as executors and trustees under the last will and testament of their deceased father, Daniel F. Crilly, it appears that the exhibits were wholly immaterial and had no relevancy to the questions arising between the litigants. Exhibit 1 is the bill of complaint filed in the Superior Court of Cook County in the controversy between certain of the defendants and the Board of Education. Just how this would tend to prove that the contract, the subject of this suit, was not with the defendants individually, is not clear; nor does the introduction of the portion of the final decree entered in that cause establish the fact. The other exhibits such as the bill from Samuel A. and Leonard B. Ettelson, addressed to the Crillys as executors and trustees, were immaterial and had no probative force upon the question involved here. This applies also to the statement for services from Mr. Manierre,

who was a party to the contract with Mr. Goldstine; also to the letter and statement for services by Mr. Scribner, a party to the contract.

Assuming from these exhibits that the bills and matters taken up with the Grillys as executors and trustees of their father's last will and testament do not of themselves dispose of the question as to whether the contract was entered into by them as executors or as individuals, this evidence was immaterial and incompetent, and under the circumstances its admission was such error as to make necessary a further trial. We are not expressing any opinion on the facts other than we find necessary in disposing of the question of the admissibility of certain evidence.

For the reasons stated, the judgment is reversed and the cause is remanded for another trial.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39544

KOLLER AND KOLLER, INC., a corporation,

(Plaintiff) Appellant,

v.

JOSEF WAGNER, doing business as WAGNER DAIRY,

(Defendant) Appellee.

MR. PRESIDING JUSTICE HEBAL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiff from a judgment entered by the court for the defendant notwithstanding the verdict of the jury.

The plaintiff operates a chemical laboratory and filed its suit in the Circuit Court of Cook County against Josef Wagner, doing business as Wagner Dairy, to recover a balance of $3,337.00 alleged to be due for services performed by the plaintiff for the defendant, as stated in the complaint filed in the cause. To this claim of the plaintiff, the defendant, Wagner Dairy, offered a defense of payment of $600 in full of plaintiff's claim. A trial was had before the court and a jury, and after consideration the jury returned a verdict in favor of the plaintiff in the sum of $1,200. A motion was made by the defendant at the close of plaintiff's case and also at the close of all the evidence, for a directed verdict in favor of the defendant, rulings on which motions were reserved by the court.

Upon the coming in of the verdict the defendant filed his motion for a new trial and also for judgment notwithstanding the verdict. On December 27, 1936, the court permitted the defendant to withdraw his motion for a new trial, and allowed defendant's motion made at the close of all the evidence, to set aside the verdict of the jury, and entered judgment for the defendant.

The facts as they appear from the evidence are that in August, 1934, the defendant Josef Wagner was plaintiff in a suit

then pending in the Circuit Court of Cook County entitled, "Josef Wagner doing business as Wagner Dairy v. Herman N. Bundesen, Commissioner of Health of the City of Chicago, et al." This suit was for an injunction and other relief against the City of Chicago because of revocation of a permit to the Wagner Dairy to sell its milk in the City of Chicago, the city having alleged that the Wagner Dairy milk contained "added water" and other substances which brought it into conflict with the rules and regulations of the City Health Department.

In that suit Josef Wagner desired to show by expert testimony that the milk was free from the objectionable features charged by the city, and to rebut by such testimony the evidence of the expert chemists for the Health Department. At the time of the alleged employment of the plaintiff herein by the defendant Josef Wagner, the said case of "Wagner v. Bundesen, et al"., was on hearing before a Master in Chancery, and continued during the months of September, October, and November, 1934, at which time a compromise with the city was effected and the proceedings in the Circuit Court were dismissed and the permit of the Wagner Dairy was restored.

On August 29, 1934, the plaintiff was called on the telephone by Joseph C. Kanak, one of the attorneys for the Wagner Dairy, who inquired as to the furnishing of expert testimony in cases involving milk analysis. This attorney was informed that the corporation was equipped to render such service. As a result of this call a conference was arranged for the following day at the offices of Grablowski & Kanak, Wagner's attorneys, between said Attorney Kanak and Mrs. Margaret M. Koller, a chemist and milk tester employed by the plaintiff corporation. At this conference, which was held on August 30, 1934, there were present Mrs. Koller, Joseph C. Kanak,

K. B. Czarnecki, another attorney for the Wagner Dairy, Frank Wagner and Joseph Wagner, Jr., both sons of the defendant Josef Wagner. Margaret M. Koller was employed by the defendant for the purpose of making tests of the milk dealt in by the defendant Josef Wagner. On the question of compensation for the service rendered by Mrs. Koller, in court as a witness the evidence is conflicting, the plaintiff contending that the agreement was for fair, reasonable, usual and customary per diem fee allowed in other cases for such evidence and services, the defendant contending that the agreement was for $200 per month, which included all milk testing.

At the request of the defendant and Joseph Wagner, Jr. Mrs. Koller made daily tests of the Wagner Dairy milk and cream starting about September 4, 1934, and continuing this service until the latter part of November, 1934, when the testing was discontinued at the request of the defendant. From the evidence it appears that the plaintiff received the sum of $600 for the monthly service requested for the months of September, October, and November, 1934.

Upon the trial of this case it was conceded by the defendant that the plaintiff was to receive from the defendant $200 per month, which sum was to cover all service to be rendered by the plaintiff, and that the plaintiff collected in full for the service rendered at the rate of $200 per month. This is disputed by the plaintiff, who contends that the evidence shows that the agreed price for the daily milk testing was $200 per month, Sundays and holidays included, and that by agreement of the parties a contract was prepared and executed by the plaintiff and subsequently submitted to the defendant for execution. This contract bore date of September 1, 1934, and was submitted to the Wagners for execution about September 15, 1934, but was never signed by the defendant.

There was evidence by the witness Margaret M. Koller that she spent 46 days on the Wagner v. Sundesen, et al. case, either in actual attendance in court, or in conference with the attorneys assisting in the preparation of technical and hypothetical questions to be asked of witnesses and in assisting said attorneys in procuring and conferring with other expert witnesses in the case; that her activities in that case were directed by attorneys Kanak and Z. B. Czarnecki, who appeared for the defendant in the Wagner v. Sundesen case.

There is also evidence in the record of the fair, reasonable and customary fees of experts in like cases by Margaret M. Koller and Arthur L. Israel, formerly chief chemist for the State Food Department and an expert on milk analysis. The testimony of these witnesses placed the usual, reasonable and customary fee at from $50 per day to $300 per day. Several attempts were made by the plaintiff to collect the amount claimed to be due for milk testing and court service during the months of October, November and December, 1934, and January, 1935, and after several meetings to settle the matter, this suit was instituted.

There is also evidence that witnesses for the defendant as to the agreement of August 30, 1934, in respect to fees, were Frank Wagner and Charles J. Grablowski, both of whom testified that Mrs. Koller's fee was $300 a month, including court service and milk testing. This was disputed by Mrs. Koller, who testified that one of the witnesses, Grablowski, was not there on that occasion.

As we have indicated, at the close of the evidence for the plaintiff, as well as at the close of all the evidence, the defendant moved the court for an instructed verdict, ruling on which was reserved by the court, and after return of the verdict fixing the amount due at $1,200, the court, upon hearing arguments of counsel, entered judgment for the defendant notwithstanding the verdict of

the jury.

Plaintiff's contention that where the evidence is conflicting it is for the jury and not for the trial court to weigh the evidence and determine the facts, does not apply in this case as the testimony of Margaret Koller, the only witness for the plaintiff, is unworthy of belief. Upon the trial of this case the defendant conceded the plaintiff was entitled to $200 a month, which was to include all service rendered by the plaintiff, and that checks were given for service rendered and she had been paid all that had been agreed upon. From the record it appears that upon the trial of the case of Wagner Dairy Company v. City of Chicago, the witness Margaret M. Koller testified upon cross examination by the City Attorney, that she was not receiving a fee for testifying in the case; that the Wagner Dairy Company was to pay her for the work she did and for that she was to come into court and testify; that she did that for any dairy company who hired her; that testifying in court was included as a part of her work when she made tests and had received the amount agreed to be paid by the dairy company. The plaintiff replies that the reason she testified she was not paid as testified to was because she was told to so testify by the defendant's attorneys. However, false testimony is a matter of grave importance and should be considered by the court to determine whether the witness committed perjury. This the trial court undoubtedly did in entering judgment for the defendant notwithstanding the verdict. The case was previously tried and a verdict returned by a jury in favor of the plaintiff, which verdict the court did not permit to stand, but granted a new trial.

The right of the plaintiff to recover for the claimed expert testimony was not established. The witness testified she made an analysis of samples of milk for the defendant for the purpose of

determining whether water had been added and bacteria found in the milk and formaldehyde used as a preservative. These facts were determined and she was required as a witness to testify the result of her examination, for which testimony she would not be entitled to recover as an expert the amount claimed for such service of from $50 to $300 a day. In Dixon v. The People, 168 Ill. 179, the Supreme Court in discussing the right of a so-called expert witness to recover as an expert an amount above the witness fees fixed by the statute, said:

> "If the precedent is once established, that expert witnesses must be paid reasonable compensation for their testimony, then it will not be long before such testimony will be offered to the highest bidder. The temptation will be to give opinions in favor of that party to the suit, who will pay the highest price. The testimony of expert witnesses will thus become partisan and one-sided. The theory, upon which such witnesses are required to testify in cases like this, is that they are amici curiae; and that testifying under the sanction of an oath, they do so, not with intent to take the part of either contestant in the suit, but with a view to arriving at the truth of the matter, and for the purpose of aiding the court to pronounce a correct judgment. In Redfield on the Law of Wills (p. 155, sec. 51, note 46) it is said: 'It being purely a matter of conventional arrangement between professional experts and those who desire to employ them as witnesses, both in regard to their acting as such, and also their making preparations to enable them to give their testimony, it virtually places a price upon such testimony in the market, and its price is likely to range somewhat according to its ability to aid one or other of the parties litigant. The tendency of this is to render it partisan and one-sided, as a general thing.'"

So it appears that the plaintiff seeks to recover not alone for the service rendered and paid for, but for service as an expert witness at a price which seems rather unusual when we consider that the testimony was given to establish the value of such service as being from $50 to $300 a day.

We believe from the facts in this case the court was justified in entering judgment for the defendant notwithstanding the verdict of the jury. The judgment is accordingly affirmed.

JUDGMENT AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39566

CAPITOL DAIRY COMPANY, a corporation, and MILK WAGON DRIVERS' UNION OF CHICAGO, LOCAL 753,

(Plaintiffs) Appellants,

v.

HERMAN MEYER,

(Defendant) Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

293 I.A. 632

FEB 2 1938

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The plaintiffs appeal from a decree of the Superior Court of Cook County whereby exceptions to the master's report were sustained, the temporary injunction theretofore granted, dissolved, and the bill of complaint dismissed for want of equity.

Plaintiffs on March 7, 1936, filed a complaint in chancery for an injunction against Herman Meyer, the defendant. The complaint alleges the corporate organization of the plaintiff, Capitol Dairy Company, and the voluntary organization of the plaintiff, Milk Wagon Drivers' Union of Chicago, Local 753, duly represented by its proper and duly authorized officials named in the bill of complaint; that the defendant, Herman Meyer, was a member of the union, and it is alleged that in accordance with all of its by-laws and rules, he agreed to be governed by the by-laws of the Milk Wagon Drivers' Union of Chicago, Local 753, and that one of the by-laws of the union was as follows:

> "It is hereby understood that the customers and the consumers of the dairy companies employing union labor, belong to and are a part of the assets and good will of said dairy company; that any milk wagon driver, a member of the Milk Wagon Drivers' Union of Chicago, Local 753, solicits, serves and sells such customers and consumers in a representative capacity only, and if for any reason whatsoever any member of the said union terminates his employment with any of the said dairy companies, or is discharged or dismissed, or for any other reason said employment ceases and is terminated, it is understood and agreed that any such members who are employed with any of the dairy companies employing members of the said union, shall not call

upon or solicit, sell or interfere with, or divert the customers or consumers formerly served by them in behalf of their former employer, for a period of two years from the date of the termination of their employment.

It is further understood that if a member of the said union, were to resign as a member of said Union, in no event would this abrogate the agreement into which he entered, until the space of two years from the time of his resignation or discharge had elapsed."

The complaint further alleges that the defendant was cognizant of this by-law, but in direct violation thereof, solicited and served customers of the plaintiff, Capitol Dairy Company, with products of other dairies after the termination of his employment, which was in violation of the said by-law. It was further alleged that by reason of violating the by-law the defendant caused dissension among the members of the union and damages by loss of trade to the dairy. The plaintiffs sought to enjoin the defendant from violating said by-law and from further soliciting the customers and consumers belonging to plaintiff, Capitol Dairy Company, a list of which customers was attached to the complaint.

Upon the filing and presentation of the complaint, a temporary injunction was granted by the court on March 7, 1936. The defendant thereafter filed two answers. In the first answer he denied all the allegations as alleged in the complaint. Later, an amended answer was filed in which he admitted, among other things, that the Dairy Company was a corporation engaged for many years in the purchase, production and sale of dairy products for human consumption; that it became and is now a valuable business, having been made so by the quality of the dairy products sold and distributed by the Dairy Company.

Defendant further admitted that the plaintiff, Milk Wagon Drivers' Union of Chicago, Local 753, was a voluntary unincorporated association of natural persons having its principal office and place of business in the City of Chicago, and that the Milk Wagon Drivers' Union of Chicago, Local 753, was lawfully and duly represented by its

named officers, and that all of them were citizens of the City of Chicago, county and state aforesaid. The defendant admitted he was a member of the Milk Wagon Drivers' Union of Chicago, Local 753, and had agreed to be bound to act in accordance with all the published by-laws, rules, regulations and agreement of the Milk Wagon Drivers' Union of Chicago, Local 753; that for five years last past he was employed by the Capitol Dairy Company as a milk wagon driver and that during all of said time the defendant called upon, solicited and served certain consumers with the products of the Capitol Dairy Company. Defendant also admitted that he had resigned from the employ of the Capitol Dairy Company on the 19th day of February,1936.

The defendant denied the existence of the by-law or the publishing of the by-law whereby it was understood and agreed by the members of the said union that they would not "strip a route" which they had formerly served while in the employ of the dairy company for 2 years from the date of their resignation or discharge.

Evidence was submitted on behalf of the plaintiff that in the month and year of December, 1915, and in the month and year of September, 1916, Steve C. Sumner was recording secretary of the Milk Wagon Drivers' Union of Chicago, Local 753; that thereafter certain by-laws were made part of the records of the union and claimed to have been duly published; that Steve C. Sumner, with the aid of an attorney, drafted a by-law in his own handwriting which was admitted in evidence as plaintiff's exhibit. This alleged by-law was written by the witness Steve C. Sumner, who was at that time recording secretary of the union, and is fully set forth in the bill of complaint.

It also appears from the evidence that all of the by-laws were not printed in a small booklet, but that there were a large number of the by-laws, which it is alleged were made a part of the records of the union, published through the officials of the union who spoke at the various meetings and who visited the men at the

various dairy branches, and also by the union stewards who were stationed at every one of the dairy branches.

There is contention between the parties as to whether such a by-law really existed as alleged in the bill of complaint filed herein.

The court after considering the objections filed as exceptions, dismissed the bill for want of equity.

While it is admitted by the defendant in this case that as between the union and its members there existed a contractual relation, he contends that in the absence of an express contract with the plaintiff dairy company such relation would not prohibit him from engaging in a competitive business.

In order to establish a relationship which would be binding upon the defendant at the time he was working for the dairy company, it must appear that the defendant resorted to false statements, or by unfair means acquired the patronage of the customers of the plaintiff dairy company for his new employer, or for himself, if he has entered into competition with the plaintiff dairy company. But should it appear from an examination of the record that the defendant's agreement of employment does not provide expressly that he, on termination of his contract is not to engage in a similar business, he would have the legal right to enter upon a fair and open competition with the plaintiff dairy company. There is no evidence in the record that an agreement existed between this defendant and the plaintiff dairy company; therefore, he was free to engage in business and enter into fair competition with his former employer.

In discussing the merits of this appeal it is well to take into consideration the law of contracts governing the right of an employer, not alone to the service of his employee, but also to whatever improvement the employee may have made in the construction of

a machine. Upon an examination of the authorities we find that whether the employer is entitled to such improvement is based upon the contract, if there is one, between the parties.

While the case of The Joliet Mfg. Co. v. Andrew F. Dice, 105 Ill. 649, is not exactly in point here, yet from analogy, the Supreme Court held that where an employee is engaged by contract to make improvements in the manufacture - as in this case - of "shellers and powers," and to work for the best interests of the company in every way he can, the employer is not entitled to the invention. The court in considering the contract between the parties, said:

> "The general rule is, that where a mechanic, in laboring for an employer in the construction of a machine, invents a valuable improvement, the invention is the property of the inventor, and not that of his employer. It may be true that where the employer hires a man of supposed inventive mind to invent for the employer an improvement in a given machine, under a special contract that the employer shall own the invention when made, and under such employment such improvement is invented by the person so employed, such invention may, in equity, become the property of the employer. But the law inclines so strongly to the rule that the invention shall be the property of its inventor, that nothing short of a clear and specific contract to that effect will vest the property of the invention in the employer, to the exclusion of the inventor."

In applying this rule to the instant case, where the plaintiff seeks, in the absence of a contract, to enjoin the defendant from engaging in the business of soliciting customers for the purpose of making sales of milk, it is not clear from the facts as alleged, even if there were a contract, that this by-law was made for the benefit of any of the union men that are employed by dairy companies. While there may be some force to the suggestion that the relationship between the defendant and the Union is a contractual one, it is applicable only to the question of whether a member of the union may be disciplined for any violation of by-laws that have been published and which control his action. But there is nothing in the contract which provides that the Dairy Company can take advantage of a by-law

which does not control its action or bind it. In citing the case of The Joliet Mfg. Co. v. Andrew F. Dice, supra, we have in mind that the courts are not prone to apply a rule which would govern the actions of the parties, unless there is an express and binding contract between the parties.

No serious contention is made here that the relation of this defendant to the plaintiff was a confidential one in the sense that by reason of it he acquired knowledge of the business secrets of the plaintiff dairy company. The defendant listed customers for this dairy company and the knowledge he obtained would of course be useful to him in the event of his representing another dairy company, and was not confidential knowledge communicated to him by the dairy company. This knowledge was derived from his activities for the benefit of the dairy company, and nothing has been called to our attention which would prohibit him from soliciting milk customers for another company which he represents, as this effort on his part was conducted after his connection with the dairy company had been terminated. Stein v. National Life Assoc. 105 Ga. 831; Grand Union Tea Co. v. Dodds, 164 Mich. 50; Federal Laundry Co. v. Zimmerman, 187 N. E. 335; Peerless Pattern Co. v. Pictorial Review Co., 132 N.Y. Supp. 37.

After careful consideration of the facts, as well as the application of the law to the case in question, we are satisfied there is nothing in the record which would indicate that the defendant secured an advantage by receiving from the dairy company a list of names of customers he supplied with milk products sold by the dairy company.

We believe the court did not err in dismissing the bill for want of equity; therefore the decree is affirmed.

DECREE AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39575

WM. WEDEL, JR., WM. WEDEL, SR., and ANNA WEDEL, (Plaintiffs) Appellants, v. MRS. JAMES (ANNETTE) CALLOWAY, (Defendant) Appellee.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

293 I.A. 632

FEB 2 1938

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

This is an appeal by the plaintiffs from a judgment finding the defendant not guilty in an action wherein the plaintiff, Wm. Wedel, Jr. charges in count one of his complaint that while riding as a guest passenger in an automobile and exercising ordinary care for his own safety, defendant was negligent in the operation of her automobile, in that she made a sudden turn, without signaling, in front of the car in which plaintiff was riding, when it came up closely behind hers, on a four-lane highway; that this was a violation of the Statutes and Ordinance; that as a direct result the driver of the automobile in which the plaintiff was riding was forced off the road, and the car skidded into a nearby telephone post, crushing the car on plaintiff, whereby he sustained permanent injuries and extended pain and suffering as a direct result of the conduct of defendant.

Plaintiff's count two charges to the same effect, except that the facts are more fully set forth, and that the defendant being engrossed with finding a street number at the time, suddenly, wilfully, and wantonly made a turn without signaling.

The jury at the close of the hearing, after considering the evidence and the instructions of the court, returned a verdict of not guilty under count one. The motion of the defendant that count two be withdrawn from the consideration of the jury was allowed by the court.

The court considered plaintiffs' motion for a new trial and in arrest of judgment, but denied the same after a hearing, and entered judgment on the verdict.

The accident in question happened on Northwest Highway within the city limits, about a mile northwest of the business district of the City of Park Ridge, Illinois, and a short distance to the northwest of where Seminary Avenue intersects Northwest Highway. This highway runs northwest and southeast, and is paved with a forty-foot concrete slab, divided into four traffic lanes. On the southerly side of the highway is a heavy telephone pole, carrying a cable, located eight feet from the edge of the pavement.

The facts as they appear from the evidence introduced by the plaintiffs show that on March 13, 1934, at about 12:30 p.m., Harold M. Roberts had driven his Chevrolet four-door 1930 sedan to the Main Township High School, located about two and one-half miles northwest of Park Ridge, where his son, Fred Roberts, William Nedel, Jr., the plaintiff herein, and Henry Auer got into the car, all students of the high school, and started to drive to Park Ridge. The plaintiff, William Nedel, Jr., was seated in the rear seat on the left side. Henry Auer was seated beside him in this seat, and Fred Roberts in the front seat next to his father. Mr. Roberts drove the car south on Potter Road to the Northwest Highway, where he turned southeast, traveling in the inner lane of the Northwest Highway, until he arrived at a point about a block from the telephone pole in question, when he crossed to the outerlane and continued in that lane, traveling, according to the testimony of his son, Fred Roberts, who was seated beside him in the front seat, at a speed of about 40 miles per hour.

When the car arrived at a point about 40 feet from the telephone pole, Mr. Roberts, Sr. applied the brakes, and the car

turned to the right, skidded 6 to 10 feet on the pavement, went off onto the shoulder, and continued to skid for a further distance of from 30 to 34 feet up to and against the pole. The impact of the automobile against the pole was of sufficient force to crush in the left side of the car and badly split the telephone pole. At the time Mr. Roberts crossed from the inner lane to the outer lane, the defendant's car was about three-quarters of a block ahead of plaintiff's car, proceeding also in a southeasterly direction, straddling the line dividing the inner and outer lanes, and traveling at a speed of about 15 miles per hour. According to the testimony of Fred Roberts, his father was catching up to the car ahead and did not decrease his speed, and made no attempt to pass to its left, and gave no warning of his approach by sounding the horn. At the time of the accident the weather was clear and the highway dry and clean and there were no other cars on the highway except an automobile bus, which was approaching some distance away from the southeast.

It appears further from the testimony of Fred Roberts that at the time Mr. Roberts, Sr. applied the brakes and turned to the right, he was up to within 25 or 30 feet of the rear of defendant's car, when she made a sudden turn to the right in front of their car, blocking the highway. This evidence, however, was contradicted by the testimony of Henry Auer, who was called as a witness for the plaintiff, and who at the time of the accident was riding in the rear seat beside the plaintiff and opposite the witness Roberts. Auer testified that the defendant's car did not make a sudden turn, but on the contrary, moved over gradually to the right side of the road, and that prior to the time it moved over, it was traveling partly in the outer lane.

It appears from the testimony of the defendant, who was driving the car, that when she approached Oakton Street, northwest

of the place of the occurrence in question, her car was straddling the inner and outer lanes. Shortly after crossing Oakton Street she started to angle over to the outside lane. At the time she started to cross to the outside lane she observed the Roberts car behind her by looking in her rear view mirror, which was attached to the inside of the car frame in front of the driver's seat, and the car was 100 feet back of where she was driving; that she at no time was in the inner lane after she had observed the Roberts car; that she did not see the accident happen, and the first she knew of it was when she heard the crash, at which time she had passed the telephone pole in question at some distance.

Harold Nelson, the driver of the bus which was approaching from the opposite direction, and who testified as a witness, stated that at the time of the accident the defendant's car had passed the telephone pole some 50 or 60 feet before the Roberts car in which the plaintiff was riding came in contact with the pole.

The material facts are in dispute and were for the jury to pass upon. The question therefore is whether the court erred in admitting certain evidence, and in the giving of instructions to the jury; also whether, as contended by the plaintiff, that the court should have allowed the jury to pass upon the question of whether or not the defendant in the operation of her automobile was chargeable with wilful and wanton misconduct.

This action as before stated is based upon plaintiff's second amended bill of complaint consisting of two counts as to the acts charged against the defendant. One count was for general negligence charged against the defendant, and the other for wilful and wanton conduct. Upon motion of the defendant, the court directed that the second count be withdrawn. Therefore the jury was not permitted to consider the evidence as to this count charging wilful and wanton negligence.

Plaintiff contends in his brief that where wilful and wanton conduct is sufficiently charged, and where there is any evidence of same in the record and proof of consequent injury to the plaintiff it becomes a question of fact for the jury, and they should be allowed to pass upon the question.

The law governing a charge of this nature is that the court is to consider the evidence offered by the plaintiff in its most favorable light and it must be accepted as true, and must also be given the most favorable interpretation that the evidence will bear. In this connection, if the facts shown by the evidence establish the truth of the allegation that the defendant acted suddenly, wilfully and wantonly in the driving of the automobile at the time in question, and by reason of such act the plaintiff was injured, the contributory negligence of the plaintiff does not relieve the defendant from liability for her wanton negligence. Calldren Express Co. v. Krug, 291 Ill. 472. In that case it was held that where there is evidence of an intentional disregard by one person of a known duty necessary to the safety of the person or property of another and an entire absence of care for the person or property of others, such as exhibits a conscious indifference to consequences, a case of constructive or legal wilfulness exists such as charges the person whose duty it was to exercise care with the consequences of wilful injury. Of course, in considering the facts as they appear from the evidence, the circumstances surrounding the occurrence of the accident must be taken into consideration in determining whether the acts were wilful or wanton, and it follows that there must be evidence to support this allegation of wilful and wanton conduct in the operation of the automobile. From the facts as we have related them it appears that the defendant, as well as the plaintiff was riding in an automobile on the Northwest Highway; that just previous

to the accident, the defendant suddenly turned her automobile to drive upon the outer lane, and, according to her own testimony, she did this after she had knowledge that the plaintiff's automobile was in the same lane and to the rear of her automobile about 100 feet after looking into what is known as a rear view mirror which was attached to her car so that she could see vehicles or persons in the rear of her car. It would seem from this evidence and from this knowledge of the defendant, which tends to support the allegations, that she should have indicated by a signal to the persons in the rear of her car the direction in which she intended to go; but this was not done by her.

It will be observed that while there is some contradiction in the evidence as to the operation of the car when the turn was made, still there is evidence of a sudden turn to the right, which caused the accident. The defendant, however, points to the fact that plaintiff's driver crossed from the inner lane to the outer lane traveling at a speed of about 40 miles an hour, and although he was rapidly catching up with the defendant's car and must necessarily pass it, yet he made no attempt to pass it on the left, as required by the statute, and gave no warning of his approach by sounding the horn. However, if we apply the rule of law which controls where there is wilful and wanton conduct, then the question of contributory negligence of the plaintiff's driver is not involved.

It is admitted that the defendant was driving in the inner lane and that she was crossing from the inner lane to the outer lane, and that in doing so she observed the other car approaching some distance behind her; that while she noticed it was approaching more rapidly than she was driving, there was no proof that she was aware of the high rate of speed at which it was traveling. As we have stated before in this opinion, she knew that this car was approaching

from the rear and did not signal so as to be noticed by the driver of the approaching car that she intended to turn into the outer lane, and if, as was stated, she turned suddenly without giving any warning, it was a question to be considered by the jury as to whether her operation of the car was such wilful and wanton conduct as would indicate a wilful disregard of consequences and lack of care for the safety of the persons in the automobile following the car of the defendant.

Other questions have been raised, but in view of our conclusion on the question of withdrawal of the second count upon the direction of the court, it will not be necessary to consider them. We are not expressing any opinion on the facts in the record other than we were obliged to do in passing upon the question decided.

For the reasons stated the judgment appealed from is reversed and the cause remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39591

SADIE ASCHER,

(Plaintiff) Appellee,

v.

WILLIAM C., sometimes called WILLIAM CURRIER LAMOREAUX,

(Defendant) Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

293 I.A. 632

FEB 2 1938

MR. PRESIDING JUSTICE MEREL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from a judgment in the sum of $690 entered against him in the Municipal Court of Chicago. The plaintiff in this action filed her verified statement of claim on January 10, 1936, in which she alleged, in substance, that there was due her from the defendant the sum of $690, being a balance for money loaned to the defendant by plaintiff's husband; that said indebtedness was given to her as a gift by her husband in the month of August, 1932; that since that time the defendant has paid to her $10 to apply on account of the original $700 due.

On March 19, 1936, the plaintiff amended her verified statement of claim by alleging, in substance, that there was due from the defendant the sum of $690, being a balance due for money loaned to the defendant by her husband; that on July 3, 1932, the said indebtedness was verbally assigned to her by her husband for a consideration of love and affection; that on April 10, 1933, the plaintiff, at the request of her husband called upon the defendant and collected a payment due on said loan; that at the time the defendant declared that the amount due and owing from him to the plaintiff's husband was $690, thereby creating an account stated between her husband and the defendant.

The defendant in his verified defense filed on March 30, 1936, denied that plaintiff's husband loaned him the sum of $690 or any part thereof; that he had a business transaction with the plaintiff's husband 10 years prior to the filing of the statement

of claim herein, and if there was any money due the plaintiff's husband, the same is barred by the statute of limitations; denied that the plaintiff is the assignee of any cause or causes of action by Nathan Ascher; alleged that Nathan Ascher departed this life and therefore this suit should have been brought by the administrator; denied that the plaintiff called on him in April, 1933, at the request of her husband; denied that the plaintiff collected a payment from him in April, 1933, on any loan due to Nathan Ascher or to the plaintiff or either of them; denied that an account stated was between him and the plaintiff on April 16, 1933, or at any time prior or subsequent thereto; denied that an alleged indebtedness of this defendant to Nathan Ascher was assigned to the plaintiff and that she is now the actual owner thereof.

Upon a trial of the cause witnesses were heard, and the court entered a final order finding the defendant guilty in manner and form as charged in plaintiff's statement of claim and assessing plaintiff's damages in the sum of $630 in tort. Judgment was entered on the finding of the court in the form stated.

From plaintiff's evidence it appears that she met the defendant in 1915, when he was employed by her husband, Nathan Ascher, as a manager of one of his theatres; that in August, 1933, she called at the Hindsberger Lamp Corporation in the Merchandise Mart, where the defendant was employed, and asked him if he would please pay back some of the money Mr. Ascher had loaned him, as they were in financial difficulty; that the defendant told her to come the following Saturday; that she went there - the Merchandise Mart - the following Saturday and told the defendant she was sorry conditions were such that she had to ask him to pay back some of the money; that Mr. Ascher was in financial straits, and in view of the fact that he had loaned the defendant this money she asked him to start paying back; that the defendant stated he was sorry to see her in this fix,

gave her $10 and said he would take care of the future payments and send her $10 a month; that a few months later she went to the office of attorney Robert Cohan, from whose office she called the defendant on the telephone, and said attorney listened in on her conversation with the defendant on an extension telephone and heard the defendant say he would take care of the money he had promised to send her; that at that time she reiterated the amount was $630; that subsequently she went to see the defendant and met Mrs. Rindsberger at the place of employment of the defendant.

There is also evidence in the record that a carbon copy of a letter written to William Lamoreaux was found in one of the cabinet drawers of Mr. Ascher, and as the witness Bess Shanahan remembered it, the letter bore date of 1924 - the spring of 1924 - that she could not recall to what address the letter to Mr. Lamoreaux, the defendant, was mailed.

There is further evidence in the record by Frank Block, a former attorney of the plaintiff, that he had a telephone conversation with the defendant regarding this claim, and in that conversation the witness said he was calling in regard to an indebtedness of several thousand dollars, and that he understood he (the defendant) paid $10 thereon and promised to pay Mrs. Ascher 10 a month; that he told the defendant he gave him this information as per instructions and information given him by Mrs. Ascher; that in reply the defendant stated he did not owe Mrs. Ascher any money and that any money he had given her had been out of charity.

The defendant was the only witness in his own behalf. He testified that he had been a salesman for the Rindsberger Manufacturing Corporation for the past 17 years; that prior thereto he was employed by Nathan Ascher, the husband of the plaintiff, as a manager of one of his theatres for about 6 years; that he first met the

plaintiff when he was so employed by her husband; that he never borrowed any money from Mr. Ascher during his lifetime, and did not talk with Mrs. Ascher in 1932 or 1933, and never paid her $10, and never promised to pay her $10 a month on account of any indebtedness.

As we regard this record the important question is whether the plaintiff has established her case in the form required by law. The evidence regarding the transfer of this account alleged to be due from the defendant is based altogether on plaintiff's testimony wherein she testified that her husband directed her to call on the defendant and said to her "Sadie, you get the money from Lamoreaux, and you can have it." On cross-examination she testified that Mr. Ascher died on July 11, 1933; that the conversation took place in 1933, and that she talked to the defendant several times in 1932, when he said he would pay her when he got the money.

In considering whether the gift upon which the plaintiff bases her action was valid as a gift inter vivos, and in passing upon the necessity of some act of transfer, the Supreme Court in Suchy v. Hajicek, 364, 502, said:

> "The question remains whether the transfer of the savings accounts was a valid gift inter vivos. It is essential to a gift inter vivos that it be absolute and irrevocable, that the donor part with all present and future dominion and control over the property, that the gift go into effect at once and not at some future time, and that there be a delivery to the donee and such a change of possession as puts it out of the power of the donor to repossess himself of the property. (People v. Osontos, 275 Ill. 402.) These elements are wanting in the present case."

It is evident from the facts that the alleged transfer was not evidenced by any writing to indicate that there was a transfer from the husband to the wife of the amount due from the defendant. In the opinion filed in this court in the case of Berry v. Berry, 238 Ill. App. 507, the court held that the gift contended for in that case was invalid. The court said:

"It will be noted that the gift claimed was of an indebtedness not evidenced by a writing obligatory, the title of which could pass by delivery but was an indebtedness subsisting in the appellant's oral promise to repay his father the amount borrowed with interest, and therefore was a chose in action and not susceptible of delivery. A delivery of the subject matter of a gift is of the essence of the title; and 'if the thing be not capable of actual delivery, there must be some equivalent to it.' If it be a chose in action, the law required an assignment, or some equivalent instrument, and the transfer must be actually executed, 2 Kent, Comm. p. 439; 28 Corpus Juris, p. 668, note 91; Van Cleef v. Maxfield, 103 Misc. 448, 171 N. Y. S. 333, affirmed 186 App. Div. 908, 172 N. Y. S. 923; Shepard v. Shepard, 164 Mich. 183, 129 N. W. 201; Parker v. Mott, 181 N. C. 435, 107 S. E. 500. A gift inter vivos made by parol of a chose in action of this character, not evidenced by a written instrument, is invalid. Adams v. Merced Stone Co., 176 Cal. 415, 178 Pac. 498, 3 A. L. R. 928-931; Poff v. Poff, 128 Va. 62, 104 S. E. 719-726; Grady v. Sheehan, 256 Pa. 377, 100 Atl. 950 Hawn v. Stoler, 208 Pa. 610, 65 L. R. A. 813, 57 Atl. 1115; Sanborn v. Goodhue, 28 N. H. 48, 59 Am. Dec. 398. The rule emphasized in the foregoing authorities was recognized and followed in this State in Wachsmuth v. Penn. Mut. Life Ins. Co. 147 Ill. App. 510; Sutton v. Lemen, 130 Ill. App. 50. We are of opinion, therefore, that the gift claimed was not valid as a gift inter vivos."

In the case of Wilson v. Keller, 9 Ill. App. 347, in which there was involved a verbal gift of a book account for medical services, the court in holding the gift invalid, said:

"A verbal gift is necessarily an executed contract; and delivery of the subject-matter of the gift is of the essence of the title. There must be an actual delivery, so far as the subject is capable of delivery; and if the thing be not capable of actual delivery, there must be some act equivalent to it. If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed. 2 Kent's Com. p. 439. If the subject be a common law chose in action, the legal title of which is not assignable, then the equitable interest passes by a delivery with intent to transfer. Penfield v. Thayer, 2 N. D. Smith (N. Y.), 305.

In the case before us, as the book account was against appellee herself, the delivery of a receipted copy of it, or of an acquittance, or possibly of a copy of the account not receipted, if the intention to transfer was clearly shown, would be a delivery suited to the subject-matter of the gift; and probably an erasure of the charges from the account book would be regarded as an equivalent act. But here, no one of these things was done, nor was an act tantamount thereto done; and the intent to give, if it ever existed, was never executed. If the intention not to charge had existed at the very time the operation was performed and the prior services rendered, a different question would be presented."

The rule of law announced in the cases from which we have above quoted is recognized and approved by this court in the recent

case of In re Estate of Antkowski, 288 Ill. App. 184. The court said:

> "The cases are to the effect that delivery of the subject matter of a gift is essential to passing title, and where the nature of the thing given is such that it is not capable of actual delivery, there must be some equivalent by way of a symbolical delivery. Delivery is essential to every gift. It follows that where the nature of the thing is such that there can be neither actual nor symbolical delivery, it is impossible to make a gift of that thing without a written assignment. It was for this reason in Wechsmuth v. Penn. Mutl Life Ins. Co., 147 Ill. App. 510, where a father said to his sons, who were indebted to him, that he had canceled the debt and that he would give it to them, the words were held ineffectual to create a gift inter vivos. For the same reason in Berry v. Berry, 238 Ill. App. 507, where a son borrowed from his father, orally agreeing to repay, it was held that this indebtedness could not form the subject matter of a merely verbal gift, but that some writing was indispensable. So also in Wilson v. Keller, 9 Ill. App. 347, where there was an alleged verbal gift of a claim due from the donee to the alleged donor for medical services, it was held that the indebtedness could not be made the subject of a verbal gift, and that the promise of the alleged donor was nudum pactum."

In considering the facts in the case before us we find there is nothing in the record but the verbal statement of the plaintiff that her husband transferred to her or made a gift of this account as against the defendant.

Notwithstanding the question of the statute of limitations and contradictory evidence as to the facts in many respects, it is well to follow the rule of law laid down by our courts where there is a transfer of accounts, notes or securities as a gift.

In the instant case the facts are not sufficiently clear to justify this court in affirming the judgment entered against the defendant, and the cause must be retried in order that the trial court may hear the evidence, pass upon the credibility of the witnesses and determine whether or not the verdict is sustained by a preponderance of the evidence.

Upon a retrial of the cause the court no doubt will correct the finding of judgment in tort as of course it was not justified by the evidence submitted to the jury.

For the reasons stated, the judgment is reversed and this cause remanded.

REVERSED AND REMANDED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39600

WILLIAM E. HENZ,

(Plaintiff) Appellee,

v.

MABELLE E. HENZ, et al.,

On Appeal of MABELLE E. HENZ,

(Defendant) Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

293 I.A. 633

FEB 2 1938

MR. PRESIDING JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT.

The defendant appeals from an order of the Circuit Court of Cook County, entered on December 30, 1938, denying the defendant's motion for leave to file her petition to vacate and set aside the decree confirming commissioners' report, ordering sale, etc., and also her motion to vacate the order of November 16, 1938, approving the report of sale of certain real estate involved in partition proceedings instituted by William E. Henz, plaintiff, against Mabelle E. Henz, defendant and former wife of the plaintiff.

No question is raised as to the pleadings, nor the decree for a partition entered on July 16, 1935. The defendant, on October 24, 1936, filed objections to the Master's report of sale, which were allowed to stand as exceptions, and which were thereafter overruled and the decree confirmed approving the sale of the real estate involved in this proceeding.

On December 30, 1936, the defendant sought to file a petition to vacate the order approving the report of sale, the decree confirming the report of the commissioners, and ordering the sale. On due consideration, however, the court denied the defendant leave to file the petition.

The complaint prayed for the partition of two separate parcels of real estate, one consisting of improved premises, and the other of three vacant and unimproved lots. There was no objection on the part of the defendant as to the partition of the three vacant and unimproved lots.

(Defendant)

On July 16, 1935, the decree of partition was entered, approving the Master's report recommending a partition, and finding: that the plaintiff William S. Renz, and the defendant, Mabelle E. Renz, were divorced December 28, 1933, and that the parties are now unmarried; that on August 5, 1931, they were named as grantees of the premises referred to as the improved premises, subject to a first lien trust deed of $14,000, dated July 10, 1929, and due five years thereafter with interest at 6 per cent per annum; that on August 6, 1931, the parties executed their principal note for $3,000, and as security executed a trust deed to Otto H. Kray, as trustee, conveying the improved property.

The decree further finds that on March 8, 1930, by warranty deed, the parties to this litigation became the owners as joint tenants of the premises described as unimproved; that the property commonly known as 1126 Woodbine Avenue, Oak Park, Illinois, was improved with a two story residence, occupied by Ralph O'Hara, under a lease from the said parties, and was defaulted; that the unimproved lots were unoccupied; that the plaintiff had paid various sums for taxes and assessments on the real estate and was entitled to a contribution from the defendant for her proportionate share; that the seisin and ownership of the improved property was in the plaintiff and the defendant, each with an undivided one-half interest in fee simple and as tenants in common, each of the interests being subject to the above mentioned trust deeds; that the seisin and ownership of the unimproved property was in the plaintiff and the defendant as joint tenants, each with a one-half interest in fee simple, and that the plaintiff was desirous that the partition or division of the premises be made in accordance with the rights of the parties.

The decree ordered that a partition be made, or, if that could not be done, then the premises should be sold, and commissioners were appointed to make partition, or, if that could not be done, to

appraise each parcel and report to the court, and any sale or partition of the improved real estate shall be subject to the trust deeds aforementioned.

On June 4, 1936, the commissioners appointed reported that they examined the premises described in the decree, and that the improved property was not susceptible of division without prejudice to the parties in interest; that the premises were encumbered by two trust deeds, as hereinbefore set forth; that the appraisal value of the premises, subject to the indebtedness was 1,000, and that the unimproved lots were susceptible of division and the premises were set off and alloted to the respective parties.

On the same date, June 4, 1936, a decree was entered by the court confirming the report of the commissioners, and ordering a sale of the improved property. The decree found from the report of the commissioners that this property was encumbered by two trust deeds, was not susceptible of division without prejudice to the parties in interest and subject to the indebtedness, and that the premises had an appraisal value of 1,000. It does not appear that any objections were filed to the report, and the decree found that the plaintiff advanced sums of money for the payment of principal and interest and other expenses on the trust deed indebtedness and taxes, and was entitled to a contribution from the defendant. The decree approved the report of the commissioners and ordered that the parties own in fee simple the severalty alloted to each, as to the vacant and unimproved premises, subject to the parties' proportionate part of the costs, and the interest of the defendant being subject to a lien on behalf of the plaintiff for any balance due to him from her by reason of his payment of taxes, assessments, and other charges.

The decree also ordered that the improved premises be sold at public sale and for the best cash bid, but not for less than

two-thirds of the appraised value, and subject to the encumbrances and taxes for 1935 and 1936; that 50 per cent of the sale price be paid at the time of the sale and the balance on the tender of the deed; that after the approval of the sale, the proceeds of the sale be deposited in court, and that the court retain jurisdiction to allow attorney's fees and costs.

On October 19, 1936, the master filed his report of sale stating that the premises were advertised for sale to the highest bidder for cash, and the best bid was $1,000 by one Helen S. Darmann, subject to the trust deeds and taxes, and that the premises were thereupon sold to her for the said amount, which was then and there deposited with the master as the full purchase price.

In the objections filed by the defendant on October 24, 1936, it was stated that the amount offered at the sale was entirely inadequate, and less than the property was worth; that the mortgages were in default and that the plaintiff was the only person with knowledge of any extension thereon, or any reduction in the principal amounts, and the names of the holders of the notes; that the bid submitted at the sale was made by the plaintiff and the purchaser was acting for the plaintiff and had no actual interest in the property; and that the approval of the bid, as submitted, be withheld until the plaintiff furnish the defendant the information sought by her.

On November 16, 1936, defendant's objections were overruled by the court, the sale approved and the cause re-referred to a master in chancery for distribution and recommendation as to solicitor's fees, costs and to state an account between the parties.

The court, on December 30, 1936, entered an order reciting that the motion of the defendant for leave to file her petition to vacate and set aside the order approving the report of the sale, and the decree of November 16, 1936, confirming the report of the commissioners and ordering the sale, was denied.

The petition, which the court refused to permit the plaintiff to file, alleged, in substance, that the court appointed three commissioners to appraise the premises, the name of one being suggested by the defendant, and the names of the other two being suggested by the plaintiff or his counsel, to fix the value of the improved property. It is further alleged in the petition that the commissioner suggested by the defendant reported in writing to the master on January 6, 1936, that he found the market value of the residence to be $17,820; that on January 13, 1936, the commissioners' report prepared by plaintiff's counsel, was executed by them, wherein it was found that a first mortgage of $14,000, and a junior mortgage of $3,000 were against the property on that date; that on May 18, 1936, the commissioners met in the office of plaintiff's counsel, and it was agreed by the commissioners that the value of the premises was $17,820. It was further alleged in the petition that plaintiff's counsel suggested the valuation be placed only on the equity and such valuation was $1,000, after allowing the amount of the outstanding encumbrances.

The petition further stated that on January 13, 1936, the date of the report of the commissioners, there was no indebtedness of $3,000 against the premises, because the plaintiff had apaid off and discharged said indebtedness on October 7, 1935; that the first lien was not $14,000, but $13,500, because $500 thereof had been paid by the plaintiff on July 9, 1935; that the indebtedness was not $17,000, on which figure the equity was appraised at $1,000, but the indebtedness was in reality $13,500, and the value of the equity $4,320. This information is alleged to have come to defendant's knowledge on December 2, 1936; that the premises were, on June 26, 1936, sold to one Helen S. Barmann, that no such person appeared at the sale, but plaintiff tendered a check to the master in payment of the purchase

price; and on information and belief, the petitioner averred that the actual purchaser of the premises was the plaintiff, and that the title thereto was taken in the name of Helen S. Barmann, for the use of the plaintiff.

The petition prayed that the order approving the report of sale be set aside and that the commissioners be directed to appraise the premises on the basis of the indebtedness on May 18,1936.

The defendant contends that the trial court abused its discretion in denying the defendant leave to file her petition to vacate the decree confirming the commissioners' report and ordering sale; she further contends that from the facts as stated in her petition she charges fraud on the part of the plaintiff sufficient to vitiate the sale under the circumstances alleged.

It appears from the affidavit of Commissioner Skillin, that he was of the opinion the market value of the premises was $17,820, to which the other commissioners agreed, but it appears further from his affidavit that if the equity was fixed at $1,000 at that time, he understood from the statement of plaintiff's attorney that the aggregate indebtedness against the property equaled a sum of approximately $17,820. It further appears from the affidavit that if he had known at the time the indebtedness was $13,500 his appraisal of the equity would have been $4,320.

The plaintiff in his brief, in answering the charge of fraud, calls to the attention of the court the fact that the decree for partition provided expressly that the property should be sold subject to the two mortgages, and that no step was ever taken by the defendant to alter this decree, and points to the fact that by the provision of the decree the property in question should be sold subject to the mortgage. It is apparent from the record that the defendant must have had knowledge of the mortgages; in fact, she executed the second mortgage. Both of the trust deeds were recorded

and the names of the trustees are a matter of public record. The defendant could have learned many of the facts from the trustees that she claims she learned on December 2, 1936, after the partition decree was entered on July 16, 1935.

From the objections filed by her to the approval of the master's report, it is to be noted she complained that the amount offered at the sale was inadequate; that the mortgages were in default, and that the plaintiff was the only person who had knowledge of the extension or any reduction in the principal amounts. These objections were overruled by the court on November 16, 1936. Where the defendant charges fraud by the plaintiff she should exercise any right she may have at the earliest possible moment, and it would seem defendant had some information regarding the inadequacy of the price, the default and reduction in the amount of the mortgage, together with the fact that Helen S. Barmann, who is not a party to this action, purchased the property for $1,000, and that she was acting for the plaintiff. All these facts were before the court when the objections were filed by the defendant, and from an examination of the record we find nothing which would indicate that the defendant did not have or should have had the knowledge necessary to question the approval of the sale. It is to be noted that the sale was approved on November 16, 1936.

The question now before this court is as to the distribution of the proceeds of the sale of the property in question to be made upon the report of the master in chancery. It is to be borne in mind that the real estate was sold subject to the encumbrance upon the property at the time the decree was entered. The first trust deed securing the payment of $14,000, and a second lien secured by a trust deed for the payment of $3,000, the amount of such lien,

As we have indicated, the court in decreeing sale ordered the property sold subject to these liens, and the decree is binding upon the parties in interest before the court.

The defendant by her petition contends that payments have been made on these liens; that the second mortgage lien was paid, and $500 was paid on the first mortgage lien, which would reduce this mortgage to $13,500.

Now, if as contended by the defendant these payments have been made, then of course the property was not sold subject to the amount actually due. Plaintiff's contention is to the effect that admitting defendant's allegation that the plaintiff had paid off part of the mortgage encumbrance and then purchased the property through a dummy, what loss did the defendant suffer. The decree for a partition and the decree ordering the sale both provided that the plaintiff have a lien on the property for any payment made by the plaintiff on the trust deed indebtedness, and that he was entitled to a contribution from the defendant for her proportionate share. We are unable to agree with this contention, for if the encumbrance was less than the amount fixed by the decree the plaintiff imposed upon the court, and we doubt that the plaintiff would take the position that the amounts paid by him, and which were known to him at the time the decree was entered, would be subject to an allowance upon a re-reference to a master in chancery for the purpose of making a proper report upon the distribution of the amounts involved in this litigation. The order is affirmed.

ORDER AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

As we have indicated, the court in decreeing sale ordered the property sold subject to these liens, and the decree is binding upon the parties in interest before the court.

The defendant by her petition contends that payments have been made on these liens; that the second mortgage lien was paid, and $500 was paid on the first mortgage lien, which would reduce this mortgage to $13,500.

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ORDER AFFIRMED.

DENIS E. SULLIVAN AND HALL, JJ. CONCUR.

39483

PIONEER TRUST & SAVINGS BANK, a corporation, as trustee, etc.,

v.

JACOB M. BEST, et al.,

MICHAEL FASHING,

Appellant,

v.

PIONEER TRUST & SAVINGS BANK, a corporation, as trustees, etc.,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court of Cook County, entered November 20, 1936, confirming a Master's report of sale and distribution, and entering a deficiency decree for the sum of $44,239.33. Prior thereto and on June 18, 1936, a decree of foreclosure was entered in the cause, which contains the following recital, to-wit: "That if the successful bidder at the sale shall bid on behalf of or for the benefit of, any corporation organized or to be organized, or any association or trust, with the intention that he or it shall become the owner of said property or properties, or any part thereof, or any beneficial interest therein, pursuant to any plan or agreement of reorganization, or acquire and use such property in pursuance of any plan or agreement of reorganization, then such successful bidder shall state to the Master in Chancery conducting the sale that he or it is bidding pursuant to a plan or agreement of reorganization, and shall further file with the Master in Chancery a complete copy of such plan or agreement, together with a brief statement of the notice theretofore given, if any, of such plan or agreement of reorganization to persons and corporations interested in the property herein involved. The Master in Chancery shall thereupon incorporate in his report of sale a statement that the purchaser has made his bid pursuant to a plan or agreement of

reorganization, and shall further incorporate a copy of the plan or agreement of reorganization with his report of sale." This decree also recites that no appearances in the foreclosure suit were filed by any of the defendants, and that all were defaulted.

Prior to the entry of the decree appealed from, and on October 15, 1936, Michael Fashing filed objections to the Master's report of sale, in which he recites that he is the owner of two bonds secured by the trust deed in question; that it appears from the report of the Master that the purchaser at the sale was not a real buyer, that such purchaser was the nominee of an alleged bondholder's protective committee, but that no plan of reorganization was ever submitted by this committee, although Fashing, through his attorneys, had requested the trustee in the trust deed to submit a plan of reorganization; that he had been informed that no such plan was ever adopted, that the sale of the property for $8,000.00 is fraudulent and, therefore, should not receive the approval of the court; that the trustee proved up fees and expenses in the sum of $1,735.00, and that such fees are unfair and unreasonable; that because the Pioneer Trust & Savings Bank is the complainant and also a defendant in the foreclosure proceeding, it acted in an inconsistant position, and that there was no one to protect the interest of the bondholders; that the court is without jurisdiction to approve the sale coupled with the reorganization plan; that plaintiff, as trustee, was in possession of the property and filed no account, and that before any approval or confirmation of the sale, the trustee should be required to account, that any moneys in the possession of the trustee should be applied on the reduction of the debt and the property for any unpaid balance, and that the purchaser at the sale should be required to file in court the agreement under which "he purchased same and the conditions and terms thereof."

From the record, we gather that on this same date, to-wit: October 15, 1936, the following proceedings were had before the court: Meyer Abrams, one of the counsel for Michael Fashing in the trial court and here, testified that he "discovered that the sale took place in July of this year"; that he asked counsel for plaintiff whether "there was any plan of reorganization because of the provisions of the decree pertaining to such a plan," and that counsel replied that "there was no plan and the property was not purchased under any plan." This was all the testimony offered or received. Mr. Abrams then, on behalf of his client, presented and asked leave of court to file, the following petition:

> "Your petitioner, Michael Fashing, respectfully shows: (1) That heretofore a complaint to foreclose the bond issue described in the complaint was filed in this cause, and that a decree of foreclosure and sale was entered June 18, 1936, as it more fully appears of record; (2) That thereafter this petitioner received a notice from John F. O'Toole, Master in Chancery, stating in the notice that pursuant to the decree a sale would be held on July 15, 1936, and that the petitioner as a bondholder, may deposit his bonds for the purpose of participating in the sale, and that if he will not deposit his bonds he will only be entitled to the proceeds of the sale; (3) that petitioner is the owner of bonds Nos. 41 and 59 for $500.00 each, which have not been deposited, and that he is informed that a sale was held on July 15, 1936, but that no report of the sale has yet been filed in this court, nor was the sale ever confirmed; (4) That Pioneer Trust and Savings Bank, the plaintiff in the case, as trustee, was in possession of the premises for several years, and collected the rents, issues and profits thereof, but that the proceedings in this cause do not disclose any accounting for the rents, issues and profits; that a demand for an accounting was made upon the plaintiff on September 2, 1936, but no accounting has been given; (5) That petitioner has paid $1,000.00 for the bonds and is interested in the premises and is entitled to an accounting from the plaintiff, as trustee, for the moneys collected and disbursed, and is also interested in the result of the sale; Wheretofore petitioner prays that a rule be entered upon the plaintiff to file an account of all moneys received and disbursed from the date the said bank commenced collecting rents out of the premises until the present time, and that the Master be required to file his report, and that leave be given to your petitioner to file objections thereto, and that the matter may be set for a hearing at a short date to be fixed by the court."

The court by order entered, denied counsel leave to file this petition. No appeal was taken from this order.

Fashing's contention on this appeal is that the provision

of the decree directing the sale of the property, was violated, in that the purchaser failed to inform the Master of the terms and conditions under which he purchased as nominee for the committee, and failed to file a plan or agreement, and that, therefore, the decree is wholly void. Also, that prior to the sale, the property had been appraised at the sum of $35,000.00, and that the price of $8,500.00 which was paid, was unfair.

As stated, the foreclosure decree contains the provision that "if the successful bidder at the sale shall bid on behalf of or for the benefit of, any corporation organized or to be organized, or any association or trust, with the intention that he or it shall become the owner of said property or properties, or any part thereof, or any beneficial interest therein, pursuant to any plan or agreement of reorganization, or acquire and use such property in pursuance of any plan or agreement of reorganization, then such successful bidder shall state to the Master in Chancery conducting the sale that he or it is bidding pursuant to a plan or agreement of reorganization, and shall further file with the Master in Chancery a complete copy of such plan or agreement, together with a brief statement of the notice theretofore given, if any, of such plan or agreement of reorganization to persons and corporations interested in the property herein involved. The Master in Chancery shall thereupon incorporate in his report of sale a statement that the purchaser has made his bid pursuant to a plan or agreement of reorganization, and shall further incorporate a copy of the plan or agreement of reorganization with his report of sale".

The petitioner Fashing, bases his xxxxx contention upon the claim that there is a provision in the decree which directs the purchaser to inform the Master of the terms and conditions under which

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

that "if [illegible]

or [illegible]

or any [illegible]

become the [illegible]

or any [illegible]

of [illegible]

any [illegible]

small at [illegible]

it is [illegible]

[illegible] forth a [illegible]

plan or [illegible]

there before [illegible]

to persons [illegible]

involved. The [illegible]

report of [illegible]

[illegible] to a plan [illegible]

incorporate a copy [illegible]

his report of [illegible]

The [illegible] XXXXX

[illegible] that there [illegible]

[illegible] to [illegible]

he purchased as nominee for a committee and which directs the purchaser to file the plan or agreement, and which was wholly violated by the purchaser at the Master's sale. There is no such provision in the decree. The provision is that if the successful bidder should bid on behalf of the persons mentioned in the decree, in pursuance of any plan of reorganization which might be had, that then such plan should be submitted to the court. There is no provision in the decree to the effect that if the bidder bids on behalf of a bondholder's protective committee which then had no plan of reorganization, that nevertheless it should be required to submit a plan. As we view the decree, all it intended was that if a reorganization plan should be agreed upon, that then such plan should be submitted to the court. There is no showing that any plan of reorganization was contemplated or agreed upon.

Counsel also insist that the price bid was not sufficient. In Chicago Title & Trust Co. v. Robin, 361 Ill. 261, which is so frequently referred to, the Supreme Court said:

> "Public policy and the interests of debtors require that stability be given to judicial sales, and they should not be disturbed unless there has been some fraud, mistake or violation of duty by the officer making the sale or by the purchaser, none of which is shown here. Mere inadequacy of price alone, is not cause for setting aside a judicial sale. Worden v. Rayburn, 313 Ill. 495; Skakel v. Cycle Trade Publishing Co., 337 id. 482."

As we read the opinion in the more recent case of Straus v. Anderson, 366 Ill. 426, we gather from the context that the court still intends that stability should be given judicial sales and that an executed sale will not be set aside for mere inadequacy of price, as the buyer at such sale has an interest or right in the property; but that where the sale is subject to the approval of the court, - the officer conducting the sale, acting as agent of the court in offering the property for sale, - the highest bidder acquires no interest or title to the property and the court may refuse to

confirm the sale merely because of the inadequate price for which the premises are struck off. In other words, under such circumstances, the chancellor may, in his judicial discretion, either affirm or refuse to affirm because of inadequacy of price. In the instant case, the court, in its discretion, chose to affirm, and in our opinion, there was no abuse of discretion in so doing.

It is suggested by his counsel here that Fashing was and is a member of the bondholder's committee. He was made a party to the suit and was defaulted. After the sale, he attempted to intervene and the court denied his petition, and he took no appeal from this order. He had allowed this property to go to sale, as provided by the terms of the foreclosure decree, to the highest and best bidder without appearing in the case, except as stated. We are of the opinion that his contentions are without merit, and that the decree of the Superior Court should be, and it is affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39496

HARRY RUSH,

Appellee,

v.

ADOLPH C. RADEFELD, et al.,
On Appeal of ADOLPH C. RADEFELD,

Appellants.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

293 I.A. 633

FEB 2 1938

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On October 23, 1930, Richard Miller obtained a judgment against Clemens Kruse, in the Municipal Court of Chicago, for the sum of $1,223.59. This judgment was assigned by Miller to the plaintiff, Harry Rush. Kruse operated a roadhouse in Des Plaines, Illinois, and was a tenant of the defendant. Upon the judgment an execution was issued, and was by the Sheriff of Cook County levied on certain property of Kruse, located in the roadhouse. Subsequently, by a writ of replevin, Radefeld, the defendant here, seized the property. Upon a trial of the right of property before a Justice of Peace, before whom the replevin suit was pending, the court found the issues for Rush, the defendant in that suit, and ordered the property returned to the Sheriff. The judgment of the Justice of Peace was appealed to the Circuit Court of Cook County, and on April 16, 1934, the appeal was dismissed, and a writ of procedendo was issued. Thereafter, the Sheriff demanded the return of the property from the defendant Radefeld, which demand Radefeld refused, and he thereafter converted the property to his own use. Plaintiff Rush, the assignee of the judgment against Kruse, brought this suit in the Circuit Court of Cook County against Radefeld, in which it is alleged that Radefeld had unlawfully converted the property to his own use, and after a trial, a judgment was entered in favor of Rush for the sum of $477.00 and costs. This is an appeal from that judgment by the defendant Radefeld.

Radefeld does not deny that he unlawfully converted certain of the property involved to his own use, but insists that Rush cannot maintain this action. He insists that the Sheriff, under the circumstances, being the only one entitled to the possession of the property, is the only person who can maintain this suit. No question is raised as to the amount of the judgment. It is not denied but that the lien of plaintiff attached as soon as the execution was placed in the hands of the Sheriff, and that plaintiff's lien was intact at the time that Radefeld unlawfully took possession of the property.

In Second National Bank v. Gilbert, 174 Ill. 485, the Supreme Court said:

> "The law is, that the lien of a judgment in the hands of a proper officer attaches to all property which the debtor owns, or which he may acquire during the life of the execution. The lien attaches to property acquired by the judgment debtor at any time while the execution is in force. (Blatchford v. Boyden, 122 Ill. 657; 1 Freeman on Executions, sec. 197; Shaffner v. Gilmore, 3 W. & S. 438.)"

In Searles v. Crombie, 28 Ill. 396, an action was brought for the wrongful taking of a horse from the possession of the plaintiff. In the trial in the Circuit Court, the jury were instructed that if the defendant had taken the horse from the plaintiff's possession, the jury should find the defendant guilty, unless the defendant had proved some right to the horse in itself, or those who assisted in such taking. Judgment was entered in the Circuit Court for the defendant, and on appeal to the Supreme Court, the judgment was reversed, and the court said:

> "The right of property may be in one and the right of possession in another. At the very least, the jury should have been told that the defendant, or those under whom he acted, should have shown affirmatively that he had a right to the immediate possession, before there could be any pretense of a justification for taking the mare from the defendant's possession".

While the Sheriff could undoubtedly have recovered the possession of this property, we are of the opinion that this fact does

not bar the plaintiff here from recovering against the defendant. The record shows beyond any question that the defendant wrongfully converted to his own use, property upon which plaintiff had a valid and enforcable lien, and that the conversion was wrongful. We are of the opinion that the judgment of the Circuit Court of Cook County was correct, and it is, therefore, affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39520

CHICAGO DAILY NEWS PRINTING COMPANY,
a corporation,

Appellee,

v.

JOYCE-WATKINS COMPANY,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment of the plaintiff against defendant, for $3,201.00, entered in the Municipal Court of Chicago, for rent alleged to be due and unpaid. The action is on a written lease dated February 5, 1935. On August 7, 1936, under a power of attorney contained in the lease, judgment was entered against the defendant for the amount mentioned.

Thereafter, defendant filed a petition in which it is alleged that in and by the terms of the lease, it was provided, among other things, as follows:

> "It is understood and agreed by the parties hereto that in the event the lessee liquidates and goes out of business, the lessee shall have the right to cancel this lease on the last day of any calendar month by giving to the lessor sixty (60) day prior written notice. Notice may be sent to the lessor or its agents by U. S. Registered Mail."

It is also alleged, in substance, that during the month of February, 1936, by action duly taken by the stockholders and board of directors of defendant corporation, said corporation was ordered liquidated; that thereupon said corporation immediately liquidated and went out of business; that due and proper notice was given to plaintiff as provided in said lease, canceling same as of May 1, 1936; that all rent due to May 1, 1936, and all other terms and provisions of said lease, by defendant to be performed, have been performed; that said judgment by confession was for rent for the period from May 1, 1936, up to and including February 28, 1938, and that said rental had not yet accrued. The prayer of the petition is to the effect that the judgment

be vacated and leave given to defendant to defend. The petition was sworn to by the secretary of the defendant corporation. The court allowed the judgment to stand as security and granted a hearing on the petition.

Plaintiff's agent testified in substance that the defendant occupied the premises under the lease, and that some time in April, 1936, it moved out and announced that no further rent would be paid; that the rent at that time, was paid up to the end of April, 1936, and that the amount due under the lease from May 1, 1936, to the end of the term, was $3,970.00. On cross examination, this witness further testified that prior to the making of the lease in question, defendant had been a tenant of plaintiff, under a written lease, that when the former lease expired, defendant owed plaintiff something over $5,000.00, and that this amount was settled when the lease in question was executed; that when the last lease was executed, plaintiff was aware that defendant was in straitened circumstances, and that he, the witness, knew that at this time, defendant was selling one of its plants at Metropolis, Illinois, used in the processing of timber, and that the money derived therefrom was used in settling the amount due on the former lease; that at that time, the president of the defendant corporation told this witness that it was not certain whether it could continue in business for three years, and that he, the president, wanted something in the lease to protect the defendant if "it liquidates and goes out of business;" that the witness received a letter from defendant dated February 28, 1936, in and by which defendant gave plaintiff notice of the cancellation of the lease, and that thereafter defendant prepared to move out of the premises, and offered to plaintiff, and plaintiff purchased, some venetian blinds and a ventilator that were used in the premises, and that this witness, on behalf of plaintiff, accepted the keys to the premises. This witness further testified that after receiving the letter referred to, he made a demand

in writing upon defendant to pay the rent.

The president of the defendant company testified to the effect that an inventory showed the assets of defendant on February 6, 1935, to be $30,000.00, which did not include any timber lands owned by defendant; that the company had accounts payable amounting to approximately $10,500.00. This witness also submitted a statement showing that the defendant, at the date of the statement, had a logging equipment valued at $300.00 and office equipment valued at $3,500.00; that it then owned two subsidiary companies known as the Watkins Creosoting Company and the Arrow Transportation Company; that the bank account of defendant then amounted to $3,165.18, that of the inventory, $3,843.00 was left, and that the accounts receivable at that time amounted to $77,140.56. He also testified that at the annual meeting of the stockholders of defendant company held on February 15, 1936, it was resolved that the officers of the defendant company be authorized and directed to proceed with the liquidation of the company in as orderly a manner as possible; that the assets of the defendant company consisting principally of timber lands, be sold, and that the Chicago office of defendant company be discontinued; that the directors of the company held another meeting on February 28, 1936, where a similar resolution to that just recited, was adopted. He testified that the business of the company consisted of supplying railroad ties and timber, both treated and untreated, and that the major part of the business was dealing in treated lumber; that the only plant for treating timber owned by the defendant company, was sold about February 5, 1935, and that after that date, the business of the defendant company was confined to dealing in untreated timber, and that it had done no business since March 1, 1936; that the last sale of untreated timber was made some time in February, 1936, that it had cut no timber since March 1, 1936, and that the sale made by

defendant of its timber lands since March 1, 1936, have been sales of its assets; that all of the property of the defendant had been offered for sale, and that defendant had been unable to sell any of its properties, except approximately 1,300 acres since March 1, 1936, and that this witness was the only employee of the company at the time of his giving his testimony. He stated that the stock of the Atkins Creosoting Company had been offered for sale by the officers of that company, but not by the defendant, and that defendant had made no effort to sell the stock of the Arrow Transportation Company. There was offered and received in evidence, without objection, a statement of the defendant company, indicating that defendant's assets as of September 30, 1936, amounted to approximately $340,000.00.

Over defendant's objection, testimony was admitted to the effect that the Atkins Creosoting Company is a wholly owned subsidiary of defendant, and that it is not in active business; that the defendant owns timber lands in Canada and Mississippi, and that the investment of defendant in the Atkins Creosoting Company is included in defendant's statement; that the Arrow Transportation Company is a wholly owned subsidiary of the defendant, and that its business is river transportation; that at the time of the hearing, it was doing nothing, that it owned two tow boats and some property in Kentucky, and that the boats were laid up because of lack of business; that the Arrow Transportation Company owns accounts receivable from affiliated companies, and that it still maintains offices in Paducah, Kentucky. There was offered and received in evidence a statement showing a large amount of assets belonging to the defendant company, which included certain accounts receivable, some of which were stated to be of doubtful value. Further, over the objections of defendant, this witness, testified that the Atkins Creosoting Company was not engaged in actual business since February 28, 1936, and that the Arrow Transportation Company had engaged in occasional trips, but had no regular business or no contracts.

The principal question here is the construction of the following clause contained in the leasing contract:

> "It is understood and agreed by the parties hereto that in the event the lessee liquidates and goes out of business, the lessee shall have the right to cancel this lease on the last day of any calendar month by giving to the lessor sixty (60) days prior written notice. Notice may be sent to the lessor or its agents by U. S. Registered Mail."

Defendant insists that the evidence shows that the condition anticipated by this clause had been reached, and that, therefore, defendant had the right, under its contract with plaintiff, to declare the lease at an end.

Both counsel have cited numerous authorities on the question as to the definition to be given the term "liquidates", when as a matter of fact, the question to be determined is the meaning of the words, "in the event the lessee liquidates and goes out of business" contained in this leasing contract. While the president of the defendant company stated that the defendant had done no business since March 1, 1936, he follows this statement with another to the effect that sales made by defendant of its timber lands since March 1, 1936, have been sales of its assets; that all property of defendant had been offered for sale, and that defendant had been able to sell none of its property other than that shown in plaintiff's statement (Exhibit C) since March 1, 1936. This statement (Exhibit C) shows that of 1174 acres of timber land in Hardin County, Tennessee, owned by defendant company on February 5, 1935, all had been sold except 840 acres; that of 1071 acres of timber land in Chester County, Tennessee, owned by defendant on February 5, 1935, the entire tract has been sold, and that of 3,455 acres in Hardin County, Tennessee, all but 1900 acres has been sold.

Defendant insists that nothing but raw timber was being sold at the time defendant sought to give notice of cancellation of the lease and subsequent thereto, and that unless treated timber was being sold at that time, that the defendant company was in process

of liquidation, was not in business, and, therefore, had the right to cancel the lease. The record seems to indicate that the only plant which it had operated for treating timber for the making of railroad ties, which seems to have been the larger portion of defendant's business shortly prior to the making of the lease in question, had been sold prior to the date of this lease. From the testimony of defendant's president, it seems clear that defendant was engaged in the same sort of business at the date of the cancellation of the lease as that in which it was engaged at the date of its execution, and that the only business contemplated when this last lease was executed, was exactly the sort of business it has been engaged in during all the period from the execution of the last lease up to and including the date of cancellation, and since.

Defendant insists that because plaintiff accepted the keys for the premises, and purchased a few of defendant's furnishings, that it is estopped to deny cancellation of the lease. This question was not raised in the petition and affidavit filed by defendant, but whether it was or not, we are of the opinion that there is no merit in the contention. The judgment of the Municipal Court of Chicago is affirmed.

AFFIRMED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39530

CLARA TURRO, Administratrix of the Estate of Ernest Miller, Deceased,

Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY, a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

293 I.A. 634

FEB 2 1938

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

By this appeal, defendant seeks the reversal of a judgment entered against it upon the verdict of a jury in the Municipal Court of Chicago, for the sum of $500.00 and costs of suit. The action is brought by Clara Turro, as administratrix of the estate of Ernest Miller, deceased.

On March 25, 1935, Ernest Miller signed an application for insurance in the industrial department of the defendant company. Among other provisions contained in the application, is the following:

> "I hereby declare that the statements recorded above are true and complete, and I agree that any misrepresentations shall render the Policy void, and that the Policy shall not be binding upon the Company unless, upon its date, I (the proposed insured if under age 14 years, 6 months) shall be alive and in sound health."

Upon the signing of this application, the agent of the defendant company issued a receipt for eighty cents to Miller, bearing the same date as the application referred to, which, among other provisions, contains the following:

> "No obligation is incurred by the Company by reason of such application or deposit unless a policy be issued and unless at the date of such policy the life proposed be in sound health; except that (1) if the deposit is of not less than four weekly premiums (or for one monthly premium, if the application is for a monthly premium policy,) and (2) if the life proposed was in good health on the date of this receipt, and (3) if the application is approved at the Home Office in New York, then, should death of person on whose life insurance was applied for occur prior to the issue of the policy but within eight weeks from the date of such application, the Company, will, upon surrender of this receipt, pay such amount as would have been due under the policy, if issued."

It is admitted that no policy was ever delivered to Miller, but it is claimed by plaintiff that at the time of his death, on April 13, 1935, the policy had been issued, and that, therefore, the company is liable.

The record indicates that prior to the trial, plaintiff had given notice to the defendant to produce the policy, which plaintiff claims had been issued, and that about November 13, 1935, plaintiff's attorney received from the attorneys for the defendant company a letter, which reads, in part, as follows:

> "Supplementing our letter to you of today, we are enclosing herewith a photostatic copy of the alleged policy involved together with a copy of the application for your files."

The copy referred to in the letter was admitted in evidence, and is, in part, as follows:

> "In consideration of the payment of the premium stated in the Schedule on the fourth page hereof, on or before each Monday until twenty full years' premiums have been paid, or until the prior death of the Insured, Hereby Agrees, subject to the conditions below and on the second page hereof, each of which is hereby made a part of this contract and binding on every person entitled to claim hereunder, to pay upon receipt of proofs of the death of the Insured made in the manner, to the extent and upon the blanks required herein, and upon sur ender of this Policy and evidence of premium payment hereunder, Two Hundred and Fifty Dollars to the executor or administrator of the Insured, unless payment be made under the provisions of the next succeeding paragraph.
>
> The Company may make any payment or grant any non-forfeiture privilege provided herein to the Insured, husband or wife, or any relative by blood or conception by marriage of the Insured, or to any other person appearing to said Company to be equitably entitled to the same by reason of having incurred expense on behalf of the Insured, or for his or her burial, and the production of a receipt signed by any of such persons, or of other proof of such payment or grant of such privilege to any of them, shall be conclusive evidence that all claims under this Policy have been satisfied.
>
> The Conditions, the Privileges and Concessions to Policyholders, the Schedule on the fourth page hereof, and any endorsement either printed or written by the Company, on this or any of the pages following are a part of this contract as fully as if recited over the signatures hereto affixed.
>
> In Witness Whereof, the said Metropolitan Life Insurance Company has, by its President and Secretary, signed and delivered this Policy on the date of issue hereof stated in the Schedule on the fourth page.

Whole Life, $250.
Premium Payable for 20 Years Only
Weekly Premium Industrial Policy
Insurance Payable at Death Only
Distribution of Surplus Annually
(See second page)
Form 8402 N Ed. 1-1935
Ages 16 to 54

A. O. Fletcher, Secretary. F. H. Koker, President.

* * * If, (1) the Insured is not alive or is not in sound health on the date of issue hereof; or if (2) before the date of issue hereof, the Insured has been rejected for insurance by this or by any other company, society or association, or has, within two years before the date of issue hereof, been attended by a physician for any serious disease or complaint, or, before said date of issue, has had any pulmonary disease, or chronic bronchitis or cancer, or disease of the heart, liver, or kidneys, unless such rejection, medical attention or previous disease is specifically recited in the 'Space for Endorsements' on the fourth page in a waiver by the Company; or if (3) any Policy on the life of the Insured hereunder has been previously issued by this Company and is in force at the date of issue hereof, unless the number of such prior Policy has been endorsed by the Company in the 'Space for Endorsements' on the fourth page hereof (it being expressly agreed that the Company shall not, in the absence of such endorsement, be assumed or held to know or to have known the existence of such prior Policy, and that the issuance of this Policy shall not be deemed a waiver of such last mentioned condition), then, in any such case, the Company may declare this Policy void and the liability of the Company in the case of any such declaration or in the case of any claim under this Policy, shall be limited to the return of premiums paid on the Policy, except in the case of fraud, in which case all premiums will be forfeited to the Company."

The copy also contains the statement that "upon receipt of due proofs that insured * * * has sustained, after the date of issue of this policy, bodily injuries, solely through external, violent and accidental means, resulting directly and independently of all other causes, in the death of the insured within ninety days from the date of such bodily injuries, and while this policy is in full force and effect and while there is no default in the payment of premium beyond the grace period, the company will pay, in addition to any other sums due under this policy, and subject to the provisions of this policy, an Accidental Death Benefit equal to the amount of insurance stipulated in the schedule." The schedule referred to provides for the payment of $250.00 insurance in case of death, so that if there is any

liability here, the amount which plaintiff is entitled to recover is $500.00. The beneficiary named in the policy is the plaintiff and administratrix.

On April 4, 1935, the insured was seriously injured in a holdup, was taken to a hospital, and died from the injuries received on April 13, 1935. It is defendant's contention that not only did it never issue a policy of insurance to plaintiff's intestate, but that the application was rejected.

Clara Turro, the plaintiff, testified, in substance, that she is the daughter of the insured; that she was acquainted with a man named Karpin of the Metropolitan Life Insurance Company, and that she had a conversation with Karpin five days before her father's death, which occurred on April 13, 1935; that Karpin came to the house and delivered some other policies to the witness, and that the witness then asked where her father's policy was, and that Karpin said to her that the policy could not be delivered until her father had left the hospital; that Karpin did not say to the witness that he had the policy with him, but that he did say, "I will deliver - I will give your father the policy after he comes out of the hospital", and that there was nothing further said about the matter at that time, and that he, Karpin, then tendered to the witness eighty cents which had been paid by the insured on the policy at the time he signed the application, which the witness refused to accept.

Anthony Turro, the husband of the plaintiff, testified to the effect that he had a conversation with Karpin, the agent of the company, about the endof April, 1935; that he, Karpin, had the eighty cents which had been paid on the policy, and said that he would return the money if he received a receipt for it, which offer the witness declined.

Charles Miller, a son of the decedent, testified to the

effect that on March 25, 1935, he overheard a conversation between his father, the applicant for insurance, and a doctor, and that at that time the doctor examined his father, patted him on the back and said that he was all right. He did not describe this doctor about which he testified, nor did he give his name. Clara Turro, the daughter and plaintiff here, testified that the examination took place on the 6th or 7th of April, 1935. She described this doctor, but did not name him.

On rebuttal, for plaintiff, George St. Pierre, a stepson of Ernest Miller, was called as a witness, and testified as follows, as shown by the abstract:

"On April 5, 1935, I left the residence there, I don't recall what the address was there where my step-dad lived. I was on my way to the store and I met Mr. Karpin. He was the agent of the insurance company. The Mutual Life.

Mr. Rothstein: (attorney for plaintiff) What insurance company?

Mr. Welsh: I object. He has answered the question.

The Court: Go ahead.

Mr. Rothstein: Was he the agent of the Mutual or Metropolitan?

The Witness: Metropolitan.

The Court: Oh, no, you can't lead him.

The Witness: I am not sure what company he was agent for. I had a conversation with him. I had seen him at the house several times but to talk to him personally - I am afraid I couldn't describe him, it has been so long and I haven't seen him since. His name is Carpenter or Karpin, something like that.

I have seen policies on his life with the Metropolitan. The last time I saw a policy was sometime ago.

Mr. Rothstein: Do you know what company now this Mr. Karpin represented?

Mr. Welsh: I object.

The Court: Objection overruled.

The Witness: The American National.

Mr. Rothstein: I don't hear you.

The Witness: Metropolitan Life Insurance Company. I had a conversation with him. It took place right across the street from our home, Mr. Miller's home, at the time. I was on my way out. I wasn't living there, I stayed there at night. On April 5th I met Mr. Karpin outside the home and he said, 'Is Mr. Miller Home?' He said, 'I have his policy.' And I says, 'No, Dad isn't home.' I says, 'He was hurt.' And he says, 'Well, then I will not be able to leave the policy'. I says, 'Well, you could take it over to my sister and leave it there.' And he says, 'No, I am not allowed to do that', That was all that was said, and I went on my way. The sister I refer to is Mrs. Turro, the plaintiff. That is all I know about this matter."

Plaintiff's claim is principally predicated upon the evidence of this witness.

Max Kurpin, the agent for the insurance company, testified to the effect that he knew the insured in his lifetime, and saw him sign the application for insurance heretofore referred to on the date which the application bears. This witness also testified that he never had any policy of insurance that had been issued to Miller in his possession, and that there was ever any such policy issued, and that he never told any of the members of the Miller family that he, the witness, had in his possession a policy to be delivered to the insured; that he saw Mr. Miller's daughter about a month after the application was written, and notified her of the fact that the application had been rejected; that he attempted to tender the eighty cents to her and that she would not accept it, and that at no time did he receive a release from anyone in the Miller family. This witness also testified that he never had any doctor go to the insured to make an examination. Plaintiff offered, and there was received in evidence, a photostatic copy of the original application executed by Ernest Miller, the insured.

The sales manager of the defendant company testified to the effect that certain marks on this last mentioned document indicated that the application had been rejected, and that he, the witness, as manager of the Lawndale district of the Metropolitan Life Insurance Company, received notice of the rejection from the home office, and that no policy was ever issued on the application. On cross examination, he testified to the effect that the insured was not in good health at the time the application was signed, and that an examination was requested by the company, that the agent of the company was instructed to make an appointment for an examination of the applicant, and that his, the agent's, information on the subject on his return to the office was that the applicant was sick in a hospital; that he,

the witness, advised the home office to that effect and received notice of the rejection referred to. He also testified that if there was a doctor at the applicant's house prior to the time referred to, such doctor was not sent there by the company, and that he received the rejection about two or three days later. This evidence was received without objection.

The deposition of the "supervisor of approving" of the industrial policy division of the Metropolitan Life Insurance Company, taken in New York, was read, and is to the effect that the witness was such supervisor in the year 1935; that among his duties was that of general supervision over the action to be taken by the company on applications for industrial insurance; that he was thoroughly familiar with the rules of the company with respect to such action, and that the application in question was acted upon by a clerk under his direct supervision; that the application was first received at the home office on March 28, 1935, as indicated by a rubber stamp impression on the margin thereof; that the application was returned to the district office which had submitted it, on April 1, 1935; that before it was returned, a decision as to the acceptability of the applicant for industrial insurance had not been rendered; that the application was later resubmitted to his department for consideration on April 11, 1935, that the application was declined, that no one was authorized to issue a policy thereon, and that a policy was never issued pursuant to the application.

The verdict of the jury is clearly against the manifest weight of the evidence, and the judgment is, therefore, reversed and the cause is remanded.

REVERSED AND REMANDED.

HEBEL, P.J. AND DENIS E. SULLIVAN, J. CONCUR.

39549

PEOPLE OF THE STATE OF ILLINOIS, ex rel.,
EDWARD J. BARRETT, Auditor of Public
Accounts of the State of Illinois,

Plaintiff below,

v.

THE WEST SIDE TRUST AND SAVINGS BANK OF
CHICAGO,

Defendant below,

L. H. Heyman, et al., Intervening Petitioners,

Appellees,

v.

WILLIAM L. O'CONNELL, Receiver,

Respondent below,

On Appeal of MARIO J. ARDITO, et al.,
Intervenors below,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

293 I.A. 634

FEB 2 1938

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

On April 26, 1934, L. H. Heyman and four other persons, members of a bondholders' committee representing the bondholders of certain mortgage bonds sold by the West Side Trust and Savings Bank, filed an intervening petition in a proceeding brought by the People of the State of Illinois on the relation of the Auditor against the bank, for the purpose of securing the resignation of the receiver of the bank from all trusteeships where the bank had been nominated as trustee and by which this committee sought the entry of an order directing the receiver to turn over to a depositary to be named by this reorganization committee, certain deposited bonds involved here. The prayer of the intervening petition was denied by the trial court. On appeal, which ultimately reached the Supreme Court, the trial court was reversed with the direction to the Superior Court of Cook County that it enter an order requiring the auditor and receiver to show cause why they should not-as prayed by the intervenors - deliver the bonds on deposit with the West Side Trust and Savings Bank, as

depositary, to a successor depositary, to be named by the bondholders' committee, and produce the names, addresses and amounts held by each of certain depositing bondholders. (People v. West Side Trust and Savings Bank, 362 Ill. 607). Thereafter, in the Superior Court of Cook County the cause was redocketed and a rule to show cause, as directed by the Supreme Court, was entered and set for a hearing on June 2, 1936. On the last mentioned date, the court gave leave to Mario J. Ardito and certain other persons, bondholders, to file an intervening petition. In this intervening petition it was alleged, inter alia, that petitioners were depositors of certain bonds claimed by the committee, that the new depositary is not entitled to possession of the bonds, that the same are the property of the petitioners, that other bonds of other persons deposited with the bondholders' committee are in the same class with the petitioners, and that the petition is filed for the mutual benefit of the petitioners and such other persons. After designating the bonds claimed to be owned by various petitioners named, the petition seeks the annulment of an agreement theretofore made between the bondholders and the committee, and they pray that a certain deposit agreement entered into between these bondholders and the committee, be declared null and void. On June 2, 1936, the committee filed an answer to the Ardito petition, and the hearing on the rule to show cause and on the Ardito petition and answer thereto were continued from time to time until January 11, 1937, on which date the court entered an agreed finding and decree, in which it made a finding as to the title of certain bonds, and entered an order directing that the receiver of the West Side Trust and Savings Bank deliver to the Live Stock National Bank of Chicago, successor depositary under the terms and provisions of deposit agreement dated December 13, 1931, all bonds deposited with the West Side Trust and Savings Bank, as depositary of the bonds in question,

except those bonds set forth in the petition of Ardito and others, and it was further ordered that the court reserve jurisdiction on the question as to the delivery and disposition of all bonds deposited by the persons named, in the petition of Ardito. Thereafter, on January 18, 1937, Ardito and others filed a petition, seeking to vacate the order of January 11, 1937, and asked that certain evidence introduced in the controversy between the receiver and the committee, stand as evidence in the petition of Ardito and others. The court, at the same time, granted leave to amend the Ardito petition. Instead of amending the Ardito petition, the same counsel who filed this petition on January 18, 1937, without leave of court, filed a similar petition on behalf of Lottie Coletta and others, in which they seek the same relief as is prayed in the Ardito petition. On February 1, 1937, for Charles F. McGorey and others, the same counsel filed a petition in which they prayed that the court permit them to adopt the Ardito petition. On February 8, 1937, the court sustained a motion to strike the Lottie Coletta petition, and on February 1, 1937, the court denied the petition of Charles F. McGorey.

The notice of appeal filed on February 16, 1937, is as follows:

> "Mario J. Ardito and all other persons named in the original intervening petition, Lottie Coletta, and all other persons named in her petition, jointly and severally give notice of an appeal taken from the order of the court made and entered February 1, 1937, denying the petition of Charles F. McGorey, et al., and from the orders of the court made and entered February 8, 1937, denying the petition of Mario J. Ardito, et al., to vacate the order of the court made and entered on or about January 11, 1937, and excluding evidence introduced at previous hearings, and striking petition of Lottie Coletta, et al., to the end that the court may grant the relief to reverse all of said orders, to grant the relief prayed in the several petitions, and vacate and hold for naught the order of January 11, 1937, to grant such other and further relief as to the court may seem proper."

We are of the opinion that the only matter properly before the court on January 11, 1937, was the application for a rule to show cause why an order should not be entered to the effect that certain of the bonds in question be delivered by the auditor and receiver of

the West Side Trust and Savings Bank to a successor depositary to be named by the bondholders' committee. By the consent decree entered on that date, the court reserved jurisdiction of the entire question as to the title of the bonds described and set forth in the Ardito petition. The order entered, being an agreed order, merely recites what the parties, other than these appealing petitioners, had agreed among themselves as to the title to the bonds involved, including those represented by the various petitioners.

In Bergman v. Rhodes, 334 Ill. 137, a bill was filed in the Circuit Court of Macoupin County for the purpose of carrying into effect certain provisions of a will. A consent decree was entered, fixing the rights of the parties, and fixing the value of certain lands, and ordering partition. Thereafter, a motion was made to set aside the decree, supported by certain objections thereto. On a hearing, the report of the commissioners theretofore appointed to make values, was approved, and a decree of sale entered. From this decree an appeal was prosecuted, which ultimately reached the Supreme Court, and in passing upon the effect and the character of the decree entered by consent of the parties, the Supreme Court said:

> "Parties who are competent to contract may agree to the rendition of a decree in respect to any right which may be the subject of litigation. When such a decree is entered it is a decree by consent. * * * A consent decree is not a judicial determination of the rights of the parties. It does not purport to represent the judgment of the court but merely records the agreement of the parties. A decree so entered by consent can not be reviewed by appeal or writ of error. (Paine v. Doughty, 251 Ill. 396; Galway v. Galway, 231 id. 217). It can only be set aside by an original bill in the nature of a bill of review."

See also People v. Spring Lake District, 253 Ill. 479.

In the instant case, in entering the order naming the new depositary for the bonds in question, the trial court was merely obeying the mandate of the Supreme Court, and in our opinion, all of the other matters involved, including the petitioners' claim of title to

certain of the bonds in question, are still within the jurisdiction of the court, in spite of the finding as to title contained in the consent decree of January 11, 1937.

We are of the opinion that none of the orders appealed from are final orders from which an appeal could be prosecuted. Therefore, all of the appeals are dismissed.

APPEALS DISMISSED.

HEBEL, C.J. and [illegible] and [illegible] N, J. concur.

39578

JOHN W. BENNETT and EDWARD M. COLBACH, doing business as BENNETT & COLBACH,

Appellants,

v.

MRS. GRACE N. FORSCHNER,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE HALL DELIVERED THE OPINION OF THE COURT.

John W. Bennett and Edward M. Colbach, attorneys - at - law, doing business as Bennett & Colbach, brought suit against the defendant to recover for fees alleged to be due to plaintiffs for services rendered as her attorneys, in attempting to collect moneys fraudulently obtained by and alleged to be due her from J. Donald Walker, Henry Jonassen and Louise M. Ranger. Defendant filed a counter claim, in which she alleged that her agreement with plaintiffs was that their fees were to be contingent upon recovery being made from the parties named, and that she advanced the sum of $3,811.00 to plaintiffs, which they agreed to return if they failed to collect from the parties mentioned. The court heard the case, entered judgment against the plaintiffs, and they appealed. Nothing is said here about the cross complaint.

From the testimony of the plaintiff Bennett, it appears that on October 15, 1934, the defendant was taken to the office of plaintiffs by one Darby A. Day, a client of plaintiffs'. Bennett testified that Day requested him to represent Mrs. Forschner in a claim which she had against J. Donald Walker, Henry Jonassen and Louise M. Ranger. These persons were charged by Mrs. Forschner with having swindled her out of a sum of money amounting to over $200,000.00, and Bennett testified that at the time she employed plaintiffs, a criminal proceeding had been instituted against these three persons, and that the criminal case was then pending, as Bennett states, "in

the Felony Court", and that Mrs. Forschner then gave Bennett $50.00 as a retainer. Bennett further testified that he started suit against these persons in the Circuit Court of Cook County and attended many hearings in the Criminal Court of Cook County and spent much time in other efforts to recover her money; that he had interviews with the State's Attorney, and that he was with the defendant when she appeared before the Grand Jury of Cook County. He testified that Walker was convicted and sent to the penitentiary, and that he afterward obtained judgment on behalf of the defendant against Walker for the sum of $252,400.00, upon which nothing has been collected.

There seems to be no question raised by defendant as to the amount of time spent in the case by these plaintiffs. She testified, however, that her agreement with the plaintiffs as to the payment of fees, and her obligation to pay, was contingent upon plaintiff's collecting from the persons who were charged with swindling her, and that any such fees should be based upon the work done and the time consummed. Plaintiff insists that there was no such agreement, that he is entitled to recover a reasonable amount for services rendered, and that even though his right to recover fees depended upon the contingency of collecting from the persons mentioned, that nevertheless, after he had obtained this judgment against Walker, defendant discharged plaintiffs as her attorneys and prevented them from taking any further steps in the matter. Defendant further testified that in addition to reasonable fees to plaintiffs, she was to pay the court costs and other expenses; that Bennett proceeded with the work of procuring evidence and investigating, and that on December 31, 1934, "I gave Mr. Bennett $3,500.00 to do with as he liked. It was borrowed money. Mr. Bennett drew my will, * * * but I gave him $100.00 for it"; that in the summer of 1935, Bennett told her that in view of the fact that he was devoting so much of his time to her work, that she would have to pay half of his office expenses, and that after

three Criminal Court trials, she gave him the $3,500.00 mentioned, to do with as he pleased; that after Bennett had devoted a great deal of time to the case and "hadn't gotten anywhere", the defendant concluded that she would turn the matter over to someone else. She stated that the time spent in court in proving up and obtaining judgment against Walker, who had defaulted, occupied about ten minutes.

From Bennett's testimony, we conclude that the time spent in the case, was mostly in the Criminal Court. A statement submitted by him of moneys received and expended shows that defendant paid him a total of $3,301.00, of which he took $650.00 for his fees; that he paid George M. Crane, an attorney who represented the persons charged with the swindle, the sum of $2,350.00, and that he paid N. H. Gruenwald, another attorney, the sum of $100.00. From the record it seems evident that Gruenwald succeeded plaintiffs as attorney for Mrs. Forschner, that he made a claim against plaintiffs and Mrs. Forschner for his fees, and that plaintiff settled with him for the sum of $100.00. The balance of the money received by Bennett, according to his statement, was paid out for court expenses, telephone calls, stenographer's fees and other sundries. Bennett testified that his services terminated in February, 1936, when the civil suit was still pending, and that he withdrew from the case because of the defendant's demand, and that at that time, defendant said to him: "Mr. Bennett, you will have to give me a substitution of attorneys in our case", and that he replied, "Yes"; that defendant said, "Yes, there is something going to be done from headquarters right away, and you cannot be in the case," and that Bennett replied, "Well, who is your attorney?" and that defendant replied: "Well, I don't know, headquarters is picking him". He testified that he called up the Bar Association in the presence of the defendant and had a conversation with the secretary of that association; that he, Bennett, then told

the defendant that he was not going to "Give you a substitution if you don't know who your lawyer is - this case is too big for me to have my withdrawal of appearance out and not know who is going to have it." Afterwards, plaintiffs withdrew as attorneys for the defendant. His testimony indicates that he worked on the case from October 15, 1934, till January 15, 1936, when his employment was terminated as hereinafter set forth.

Plaintiffs deny the statement of defendant concerning their agreement as to fees, but do not say what the agreement was. They insist, however, that in view of their discharge before they had an opportunity to carry the matter to its conclusion, that even though defendant is correct, still they are entitled to recovery on a <u>quantum meruit</u> basis for services rendered, and that the court was in error, under the circumstances, in dismissing the suit and finding for the defendant.

Shortly prior to the transactions between Mrs. Forschner and the persons who were charged with having swindled her out of her money, Walker, one of the alleged co-conspirators, had been released from the Illinois Penitentiary on parole.

Plaintiff Bennett testified that the $3,500.00 referred to which Mrs. Forschner delivered to him, was paid on October 31, 1934; that prior to that time, Bennett had a talk with Mrs. Forschner, her son and Darby A. Day, and that information had been received by him that Walker had some documents which could be used in the civil case to establish a conspiracy between Jonassen and Walker, and that Walker wanted $2,250.00 for these documents, that <u>they</u>, apparently meaning the alleged swindlers, had to have that amount of money for something about the payment of bonds in the Criminal Court. He further stated that "I had seen in particular two of those documents that I was very anxious to have, one in particular was the letter with the signature

of 'Hank', which I had later submitted to a handwriting expert, and he had advised me it was Jonassen's signature, and the other document was a horse race partnership agreement." He testified to the effect that Day was in California, and that he talked to him over long distance telephone, that Day refused to approve the payment of this money and that he, Bennett, said to defendant: "Mrs. Forschner, you give me about $3,500.00 right now so I can satisfy them, [meaning the alleged swindlers] I mean business, and then I can stall them until Mr. Day returns, and then maybe I can get his O.K. Under these circumstances, she delivered the money to me. I wanted the money in my hands so that the other side would know she gave it to me." The record indicates that Bennett, at that time, procured Mrs. Forschner's signature to an order directing him to deliver to one Crane, attorney for these alleged co-conspirators in both the criminal and civil courts, the sum of $2,850.00. On the trial in the instant case, Bennett was asked the following question by the trial judge: "Question. What justification did you have to spend $2,850.00 to get a judgment that might not be worth anything if you got it?" Bennett's answer was: "Mr.Jonassen was this man's [J. Donald Walker's] sponsor on parole at the time I was working on this case. I had little knowledge concerning his financial ability and it developed Mr. Jonassen employed Mr. Walker at his place of business on salary and he made his weekly or monthly reports to the parole board from there, and the two of them would be out of the city by permission of the parole board for practically the entire racing season and the information obtained was to the effect that the two of them were entering horses in these various races, and then later information developed that the horses they had consisted of twenty-six in number, all thoroughbreds, expensive horses, and further information developed that three or four of those horses were consistent winners, in one particular case, one horse won seven races

in a row. As to finances, that was as far as I was able to get. For the purpose of pursuing this party, [Walker] Jonassen and Mrs. Ranger - as to Mrs. Ranger, there is no question but what all of the statements Mrs. Forschner had made to me concerning her were true and correct and the statements made by Mrs. Ranger to her were false - but our objective at that time was to locate some place on this earth where Walker had deposited this $250,000.00 that he had gotten from Mrs. Forschner, and I was pursuing every angle of it, and due to the fact that there was a combination between the two of them, this relationship of sponsor and parolee and the fact that they were together all the time and he was responsible for his acts and knowledge of his whereabouts all of the time while he was on parole, and the fact that there were financial dealings between the two, as later developed, caused me to prepare and file this civil suit alleging against the three of them conspiracy to obtain these various amounts of money from Mrs. Forschner." The moneys obtained from Mrs. Forschner by the alleged conspirators was obtained, directly, by Louise M. Ranger. This is the only explanation given by Bennett as to why he paid Crane, the attorney for Walker, $2,350.00.

We have carefully gone over the entire record in this case, and we can come to no other conclusion than that the trial court was right in its finding. The action of these plaintiff attorneys, and the entire procedure, seems to have been rather fantastic. Why they should have induced defendant to consent that they pay a large amount of her money to the lawyer representing the persons who swindled her out of an immense sum, for the apparent purpose of attempting to induce one of these persons to turn certain documents over to Bennett, is, to say the least, difficult to understand. Also, it is apparent that Bennett's effort in the direction noted, was entirely without

result or benefit to the defendant. A review of the record leads us to conclude that in all the time which they claim they devoted to defendant's matters, they accomplished nothing. The judgment of the Superior Court of Cook County is, therefore, affirmed.

AFFIRMED.

HEBEL, P.J. AND DAVID S. SULLIVAN, J. CONCUR.

39552

MILDRED L. ROCCA,

Appellee,

v.

METROPOLITAN LIFE INSURANCE COMPANY,
a corporation,

Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

2931 I.A. 634

FEB 2 1938

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

A judgment for $5,941.40 was entered in the Superior Court in favor of plaintiff and against defendant. The cause was tried before a court and jury and judgment was entered on the verdict of the jury, from which judgment defendant brings this appeal.

Plaintiff's first complaint alleged the issuance of a 10 year term policy dated December 11, 1932, in the sum of $5,000.00 on the life of Enrico F. Rocca and that while said policy was in full force and effect on December 14, 1932, Enrico F. Rocca died; that he kept and performed and observed all the conditions of said policy and that plaintiff filed proof of death.

Defendant made a motion to dismiss the first count which was sustained. Thereafter, the amended first additional count was filed in which it was alleged that in November, 1932, Enrico F. Rocca received a letter from the Metropolitan Life Insurance Company which notified him that the term policy would expire on December 11, 1932, unless he desired to renew the policy and pay the renewal premium on or before the day the policy expired or exercise the privilege granted by the Company of conversion of said policy to a policy on the Endowment at age 85, or Limited Payment Life or Endowment Plan. With the letter was enclosed a printed application for renewal which stated "should be completed and sent to us with your policy and a remittance of the renewal premium to reach us on or before the expiry date of the policy".

The amended first additional count also alleged that on or before December 7, 1932, the local representative of the defendant mentioned in said letter, called on Rocca and solicited him to renew said policy for a further period of ten years and stated that the premium would be $58.50 per year and that there was a dividend of $23.70, which would be applied toward the payment of the renewal premium; that Rocca then requested that defendant renew the policy for a further term of 10 years; that the local representative told Rocca that said policy would be continued for a period of 10 years and that a notice of the renewal premium would be received by him and that he could pay the premium after deducting said dividend of $23.70 within 31 days from December 11, 1932; that plaintiff was the beneficiary designated in the policy, and that Rocca died December 14, 1932.

Defendant's answer admitted that the policy dated December 11, 1922, had been executed and delivered and that plaintiff is the beneficiary named in said policy but denied the policy was in force on December 14, 1932; averred the policy expired by its terms December 11, 1932, prior to the death of said Rocca; that an agent of defendant called on Rocca prior to December 11, 1932, and defendant denied that Rocca, at any time prior to his death, requested the defendant or any agent or any representative to renew the policy for a period of 10 years from December 11, 1932, and denied that Rocca requested defendant to credit the amount of the dividend toward the payment of the first premium and denied that the defendant or any agent or representative told Rocca that the policy would continue for a period of 10 years; denied that any agent or local representative stated that a notice for the renewal premium would be received and could be paid within 31 days after December 11, 1932; denies the local representative was authorized by defendant to consummate the renewal of said policy for the further period of 10 years or for any

period; denies that defendant or anyone in its behalf renewed said policy and denies that any written application for a 10 year term policy was made by Enrico F. Rocca on or before the date of his death.

Defendant's answer further alleges that M. Kanter and Herbert Kettler called on Rocca prior to his death and that Rocca refused to make any application for the renewal of the policy; that the dividend was tendered and refused and no application nor request was made by Rocca for a renewal of the policy as provided therein; that the policy provides that no agent is authorized to waive forfeitures or to make, modify or discharge contracts or to extend the time for paying a premium; that the local representative was not authorized to consummate the renewal of said policy or to extend the time for payment of the first premium due on said alleged renewal of said policy.

Defendant's answer further denied that Enrico Rocca kept, performed and observed all conditions in and by said policy on his part to be performed, and denies his alleged willingness and ability to pay the alleged first premium due on said alleged renewal policy on December 11, 1932, and denied that anything alleged to have been done in the complaint was sufficient to renew the policy.

Plaintiff's theory of the case is that Seaman, the soliciting agent of the Company, received a written application for the extension of the 10 year term policy and promised Rocca that he would not have to pay the premium on or before December 11, 1932, the date the policy expired, and that thereby a renewal of the term policy was accomplished.

Defendant's theory is that there was no proof that Seaman was authorized to waive the requirements of the policy pertaining to renewal and that he did not waive such requirements; also that the jury were improperly instructed on the law and that the verdict and

judgment are contrary to the manifest weight of the evidence; that the trial judge erred in his rulings on evidence in the case and that the judgment should be reversed because the insurance was not in force on the date of Rocca's death.

The evidence tends to show that on December 11, 1933, the defendant, Metropolitan Life Insurance Company, issued an insurance policy for $5,000.00 on the life of Enrico F. Rocca; that said policy was renewable without examination and convertible into another policy, for further terms of 10 years at an advanced premium and that it was issued to Enrico F. Rocca at the age of 35; that the annual premium was $50.65, payable for 10 years or until prior death.

The language of certain clauses in the policy, the construction of which are in dispute, read as follows:

> "No agent is authorized to waive forfeitures or to make, modify or discharge contracts, or to extend the time for paying a premium.
>
> * * * * * *
>
> All premiums are payable annually in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by the President, Vice President, Secretary or Actuary of the Company and countersigned by said agent.
>
> A grace of thirty-one days, without interest charge, shall be granted for the payment of every premium after the first during which period the insurance shall continue in force. If death occur within the days of grace any unpaid premium for the then current policy year shall be deducted from the amount payable hereunder.
>
> * * * * * *
>
> Privilege of Renewal: If the insured be not over the age of sixty-five years, the owner of this Policy may renew this Policy without medical examination, for further terms of ten years each, by written notice to the Company at its said Home Office accompanied by the Policy for suitable endorsement on or before the expiration of the insurance hereunder, and by paying the premiums to be fixed by the age on the birthday nearest to the date of such renewal, in accordance with the following table for each one thousand dollars of insurance. If the insured shall be over the age of sixty-five years, this Policy may upon similar notice be surrendered for an Endowment at Age 85 Policy, which shall require premiums in accordance with the following table for each one thousand dollars of insurance."

Then follows a table of premiums for renewals, which show that the premium due at the age of 35, would be $11.70 per thousand, which on $5,000.00, as in this case, would amount to $58.50, being the yearly

premium for the renewal of the policy for a period of 10 years.

At the trial plaintiff testified that she was the wife of the deceased Enrico F. Rocca; that her husband died on December 14, 1932; that up to the time of his death her husband had been a druggist and his place of business was located at 700 Bellewood avenue, Bellewood, Illinois, a suburb of Chicago; that she knew Ben Seaman, an agent for the Metropolitan Life Insurance Company, and had a conversation with him in the drug store about 8 o'clock one evening in the early part of December, 1932; that her daughter and her brother were there, as her brother was clerking in the store at the time, and that her husband was also there; that Seaman spoke to them and that her husband walked back of the prescription counter to fill a prescription and Mr. Seaman asked her husband if he would fill out an application for renewal of the term policy; that her husband asked Seaman if he would wait a few minutes until he filled the prescription and that he would take care of it; that she and Mr. Seaman stepped a few feet away and that he took out a form and laid it on a table and asked her if she would answer a few questions concerning her husband; that she at first objected, but he said they were a few questions that she could answer, so he proceeded to ask her what was her husband's full name, and that she spelled it out for him as he wrote it on the form; that this was an application for the renewal of the term policy; that she saw the paper Mr. Seaman had in his hand and read the large print at the top; that the other printed form was fine print and she answered his questions as he read them.

Plaintiff identified plaintiff's exhibit 3, which was offered in evidence, it reads in part as follows:

"METROPOLITAN LIFE INSURANCE
COMPANY
Ordinary Department

Home Office
1 Madison Ave.,
New York, N. Y.

District Oak Park, Illinois Policy No. 3493824 A
Date of Expiry Dec. 11, 1932 Renewal Premium
58.50 Dividend 22.70 Nov. 4, 1932

Enrico F. Rocca
1001 12th Avenue North
Melrose Park, Illinois

To the Policyholder:

The above numbered Renewable Term Policy will expire on the date stated above and the insurance thereunder will cease on that date unless you have indicated in writing your desire to renew the policy at the above stated renewal premium for your attained age, and have paid this renewal premium on or before the date the policy expires; or have exercised the privilege granted by the Company of conversion to a policy on the Endowment at Age 85, or Limited Payment Life or Endowment Plan.

The enclosed application for renewal, Form 0129, should be completed and sent to us with your policy and a remittance of the renewal premium to reach us on or before the expiry date of the policy.

The dividend stated above for the past policy year may be applied toward the payment of the renewal premium or taken in cash.

* * * * * * * * * * * *

We shall be glad to have you continue as a policyholder and have asked our local representative to confer with you about the renewal or conversion of the policy.

Yours truly,
A. P. Darling,
Section Manager."

Plaintiff further testified that she found exhibit 3, a blank application form, in her husband's papers after his death; that on the paper Mr. Seaman had, she read: "Application form for renewal of term policy, Metropolitan Life Insurance Company"; that she spelled out her husband's name in full for Mr. Seaman and answered one or two other questions, it may have been an address and his age, and that Mr. Seaman wrote them down on the form and said that was all; that just then her husband finished filling the prescription; that thereafter her husband read over the form and signed it and he asked Seaman if that was all he had to do and Seaman said, "Yes, your policy goes on for another 10 years"; that she asked Mr. Seaman how much the payments would amount to annually and Seaman said there was going to be a slight increase; that the amount had been $50 and that it was increased to $58.00 and some cents and that she

asked how they could pay it and that Seaman explained that there was a dividend of $32.50 coming from the insurance that year and that it would be applied as a down payment on the premium and the company would send a bill for the balance and her husband could send a check within 30 days after December 11th; that on the night her husband signed the application in the drug store her daughter and her brother were present as they all had supper there at the store; that no one but her husband signed the paper; that she does not remember anyone else signing as a witness; that her husband may have had the policy but that she did not recall seeing the policy there at that time and did not see the policy given to Mr. Seaman; that Mr. Seaman did not call on them after that.

Lorelei M. Rocca, called as a witness on behalf of plaintiff, testified that Enrico Rocca was her father; that in December, 1932, when she met Ben Seaman in her father's drug store she was 12 years old and at the time of the trial she was 16 years old; that usually she had been at the drug store every night, because they had supper at the store; that her uncle Kenneth Luurs was clerking at the store and was there with her father, her mother and herself the night Ben Seaman came into the drug store; that she was sitting at the desk near the prescription counter at the back of the store when Mr. Seaman, her mother and her father came back there; that Mr. Seaman spoke to her father about the policy and the renewal of the policy and her father asked him if he would step out in front for a few minutes while he filled a prescription; that Mr. Seaman asked her mother some questions and wrote the answers down on a piece of paper and when he had finished he handed the paper to her father to sign and her father signed it; that her mother asked if that was all and how the payments were to be made and Mr. Seaman said the dividend of $32 and some cents was to be paid on the premium on that policy for that year; that "a dividend from that year for the policy for

the past year was to apply on the renewal of that policy and the rest was to be paid in 30 days;"that she saw her father sign the paper but that she did not read it; that her father took out a Prudential policy about that time; that she did not see the policy in the Metropolitan Life Insurance Company there that night; that she believed her father kept the policy in a box at the bank until the bank closed.

Kenneth Kuurs, also a witness on behalf of plaintiff, testified that he worked for his brother-in-law in the drug store; that he saw Ben Seaman in the drug store in the early part of December, 1932, and that he heard the conversation between Ben Seaman and his sister; that Seaman wanted to find out about the renewal of the term policy; that he did not hear all the conversation as he was busy waiting on customers, but that he did hear and see Seaman lay a slip of paper on the counter and his brother-in-law signed it and asked about the premium and Seaman told him how much it would be, he mentioned a dividend check that would apply on the premium and that he would get a notice to pay the balance in a couple of weeks.

Plaintiff's exhibit 4, is a photostatic copy of the requisition for a license to be issued by the State of Illinois under the statute and reads in part as follows:

> "This is to certify that the Metropolitan Life Insurance Company of 1 Madison Avenue, New York has appointed Ben Seaman of 1548 S. Kolin Ave. Chicago, Cook County agent, for the transaction of its authorized business of insurance in the State of Illinois for the term ending March 1, 1933, unless such appointment be sooner revoked.
> Dated at New York this 1st day of March, 1932.
> Metropolitan Life Insurance Company."

The reverse side of said requisition reads in part as follows:

> "This is to certify that _____ has designated the following persons to be licensed as agents of and for the company named on the reverse side of this license and said persons are hereby duly licensed and constitute the authorized agents of said company for the purpose indicated and according to the provisions upon the reverse side hereof, which are made a part hereof until the first day of March, 1933, unless this license be sooner revoked or otherwise terminated."

At the close of plaintiff's evidence a motion was made to instruct the jury for the defendant, which was denied.

Ben Seaman, a witness on behalf of defendant, testified that he contacted Enrico F. Rocca regarding his insurance; that the first time he saw him was about the middle of November, 1932, and thereafter saw him about seven or eight times and that he saw him in his place of business as he was a druggist; that he did not remember anyone else being in the drug store on December 1, 1932, but Mr. and Mrs. Rocca; that he did not know Rocca's daughter; that at the time Mr. and Mrs. Rocca were behind the prescription counter he had a conversation with them with reference to the policy that was due to expire; that he could not give the exact words of that conversation, but it was contrary to what he wanted them to do; that Mr. Rocca never signed any papers for him; that he tried to fill out the application for the renewal of the policy, but was not given the information; that he did not think he asked Mrs. Rocca any questions to fill out that particular form; that it was not signed by Rocca; that he did not remember whether the policy was surrendered or not, but he believed it was a home office rule that he picked up the policy anyway; that he did not tell Rocca on December 1, 1932, that there was a dividend of $22.70 due on the policy or that the policy was reinstated and had an advance premium of $58.70, and that in 30 days or in two weeks they would receive a bill from the home office and that they should pay the premium then; that he probably saw Rocca one or two nights after December 1, 1932, and had a conversation with him at that time with reference to renewing the policy; that he saw Rocca several times, an average of two or three times a week, until the time of his decease and that he never signed anything; that after Rocca's death he called on Mrs. Rocca as the company asked him to give her the dividend check; that he offered her the check but it was refused; that on two occasions when he called he had a different man

with him, one was a man by the name of Gettler, who was his immediate assistant manager, and on the other occasion he brought Martin Kanter with him.

Seaman further testifying stated that the purpose of his call was the reinstatement of a policy that was due to expire on the life of Mr. Rocca; that he had the reinstatement form in his pocket; that he had several conversations with Mr. and Mrs. Rocca about the reinstatement form; that the purpose of the call was to get Rocca to sign the reinstatement form; that he told Rocca the term policy he had with the company was about to expire; that the renewal policy was for another 10 years at an increased premium; that he told them that the dividend due would pay the premium in part; that Mr. Rocca gave him to understand that he was not interested.

Defendant introduced its exhibit 1 which was the Application for Renewal of Renewable Term Policy, but the signature of Enrico B. Rocca, the deceased, did not appear thereon.

Defendant thereupon called a witness, Arthur L. Stout, who testified that he was an agent of another Insurance Company, The Prudential Insurance Company of America, and that defendant's exhibit 2, was an application made by Mr. Rocca with The Prudential Insurance Company, for insurance, and bore the witness' signature and that he saw Mr. Rocca sign that document on the date it bears, December 2nd.

Two pertinent questions and answers in the questionnaire of The Prudential Insurance Company of America, were as follows:

"6. Give below particulars of all life insurance including war risk and group insurance, carried in this and other companies or associations.

	Name of Company or Association	Amount of Policy	Kind of Policy
Ans.	U. S. Government	2,000.00	20 Payment Life
	" " "	3,000.00	20 yr End.

20. Are you negotiating or have you applied for other insurance on your life at this time in this or any other company or association? If so, give name of company or association and amount. No."

The deceased did not at that time say that he had an insurance policy with the Metropolitan Life Insurance Company and he requested that the Prudential Life Insurance policy be dated December 11, 1932. It appears from this evidence that he was substituting the Prudential policy for the policy which he held with the Metropolitan Life Insurance Company, which policy expired on the same date.

The witness Martin Kanter, called on behalf of defendant, testified he was an agent of defendant; that he accompanied Mr. Seaman when he called on Enrico Rocca in the early part of December, 1932; that he had a conversation with Mr. Rocca as Mr. Seaman was trying to conserve a $5,000.00 policy on the term plan th t was due to go out of date at that time; th t Rocca said he was not interested in the policy at all; that to his knowledge Seaman did not have a conversation with Mrs. Rocca that night; that when Rocca was told that his policy was about to expire and his grace period had not much longer to run, he said he did not particularly care to continue with the policy.

Herbert Gettler, a witness for defendant, testified by deposition that he lived in Terre Haute, Indiana; that in November, 1932, he went with Ben Seaman to see Enrico Rocca with regard to renewing his policy with the Metropolitan Life Insurance Company and had a conversation with him in the drug store; that he asked Rocca to renew the policy in the presence of Rocca's wife; that Mrs. Rocca said he could do better with the money than the Metropolitan could - that all they were interested in was the $22.70 that was due them; that Rocca refused to listen to the suggestion that he renew his policy or take out any other kind of policy with the Metropolitan and insisted on the company sending him a check for $22.70; that Mrs. Rocca opposed the renewal of the policy; that he told Rocca that

it would cost him $58.50 to renew the policy, but did not tell him that the $22.70 would be applied on the renewal policy and that he would get a notice from the company and he would have 31 days to pay the balance of the $58.50; that Rocco did not request that the policy which was to expire on December 11, 1932 be renewed for a further term of 10 years at the premium of $58.50 and that the dividend credit of $22.70 be applied on the payment for said premium; that neither he nor Mr. Seaman told Mr. Rocco that his policy which would expire December 11, 1932 would be continued for another 10 years without any further action on his part and that a notice for said renewal premium would be received by him from the home office of the defendant, and he could pay said premium after deducting said dividend of $22.70 at any time within 31 days after December 11, 1932.

In rebuttal plaintiff denied that she had ever seen Mr. Kanter before the day of the trial and that she never saw Mr. Gettler, whose deposition she heard read; that she was not present at a conversation between her husband and Mr. Gettler or that she made the statement that she "could do better with the money than what the Metropolitan can - that all I wanted or was interested in was for 'us' to get the $22.70 due us."

Kenneth Luurs, a witness for plaintiff, when called in rebuttal stated that neither Mr. Kanter nor Mr. Gettler was in the drug store while he was there during the months of November and December, 1932; and again that "He [Mr. Gettler] was there more than once while I was in the store in the months of November and December, 1932."

No evidence was offered by the plaintiff to show it was customary for the agents of the defendant to do other than solicit insurance; that the agents in violation of the terms of the policy

were permitted to collect premiums and negotiate terms different than those provided by the terms of the policy.

The evidence shows, as heretofore stated, that after Enrico Rocca's death, there was found among his effects a blank application for the renewal of his policy. It had not been signed nor had it been filled out and it was doubtless one that he had received from the soliciting agent of the defendant company.

It will be noted that the evidence in this case also shows that the first complaint filed was based on the theory that the insurance was still in force and that Enrico Rocca had 31 days from the date of expiration within which to renew the policy based on the language used therein, which reads:

> "A grace of thirty-one days, without interest charge, shall be granted for the payment of every premium after the first during which period the insurance shall continue in force. If death occur within the days of grace any unpaid premium for the then current policy year shall be deducted from the amount payable hereunder."

The court below sustained the objection to this claim and we think rightfully so as on the date of the expiration of the policy no premium was due unless it could be said a new contract was entered into between the parties. There were no days of grace after the date of expiration of the policy.

We are mindful of the rule that courts should use the utmost caution not to interfere with the verdicts of juries and that it is one of the important functions of a jury to decide controverted questions of fact. See The People v. Hanisch, 361 Ill. 465, yet the burden rests upon the appellate courts of this state to determine whether or not the verdict is against the manifest weight of the evidence.

As the Supreme Court said in the case of Donelson v. East St. Louis R. Co., 235 Ill. 635, at page 638:

> "In Belden v. Innis, 84 Ill. 78, the court said that in all cases where a verdict is manifestly and palpably against the weight of the evidence the judge in the trial court should

promptly take the responsibility of setting aside the verdict, and a failure to do so is error. If a verdict is manifestly against the weight of the evidence, it is not necessary that it should further appear that it was not the result of the impartial and honest judgment of the jury, nor that it resulted from prejudice, passion or some improper motive or condition. To permit a verdict which is clearly and manifestly against the weight of the evidence to stand, upon the supposition that the jury were impartial and honest, would be as unjust and injurious to the defeated party as though it proceeded from passion, prejudice or some improper motive.

Again, it is not the rule that an appellate court will not reverse a judgment of a trial court where the evidence of the successful party, when considered by itself, is clearly sufficient to sustain the verdict, - which is the rule on a motion to direct a verdict. That rule was stated by this court in several cases of contested wills where the evidence was in irreconcilable conflict and the validity of the will depended largely upon opinion evidence, and among other cases was Calvert v. Carpenter, 96 Ill. 63. The supposed rule was not extended to actions at law, and the whole matter was set right in Bradley v. Palmer, 193 Ill. 15. The court there said (p.30): 'Manifestly, it was never said by this court, nor intended that it should be understood, that the court will not interfere with a verdict, in a case of this kind, on the ground that it is clearly against the weight of the evidence, where the evidence is conflicting, unless the evidence of the successful party, standing alone and considered by itself, is insufficient to sustain the decree. It has been repeatedly said that the rule is the same as in cases at law, and the statement of it in some of the cases in this form, 'that where there is a conflict in the evidence this court will not reverse the decree if the evidence of the successful party, when considered alone, is sufficient to sustain the decree,' is clearly subject to the qualification usually stated in the cases, that the verdict is not clearly against the weight of the evidence. When, as in the case at bar, the record shows that the verdict is against the clear weight and preponderance of the evidence, it will be set aside, as in cases at law.'"

The witnesses for plaintiff were her daughter, her nephew and herself, she being the beneficiary named in the policy. Plaintiff offered no evidence other than oral testimony in support of her claim.

The defendant, on the contrary, produced several witnesses who denied that the decedent was desirous and willing to renew his policy, which testimony is supported by the fact that on the date of the expiration of the Metropolitan Policy Rocca made an application for insurance with the Prudential Life Insurance Company, which application was offered in evidence, wherein, when listing

other insurance in force which he held, he did not claim to be insured under this Metropolitan policy. Such application for insurance in the Prudential Life Insurance Company plainly shows that Rocca did not regard the Metropolitan Life Insurance Company's policy as in force on the date of December 11, 1933. Other mute testimonials, such as the blank application form which was found among Rocca's papers after his death, no attempt having been made to obtain the signed one, if it existed, strongly support the contention of the defendant and we think render the verdict returned by the jury as being against the manifest weight of the evidence.

Other questions are raised as to the power and authority of the agents of the defendant company and also as to the instructions to the jury that were given, but, inasmuch as this case must be retried, we do not deem it necessary to discuss them at this time.

For the reasons herein given the judgment of the Circuit Court is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED.

HEBEL, P.J. AND HALL, J. CONCUR.

39611

JIM BROOKS, for use of MINNIE SEIDEN,

(Plaintiff) Appellant,

v.

HARTFORD ACCIDENT & INDEMNITY COMPANY OF HARTFORD, CONNECTICUT, a corp.,

(Garnishee) Appellee.

JIM BROOKS, for use of LOUIS SEIDEN,

(Plaintiff) Appellant,

v.

HARTFORD ACCIDENT & INDEMNITY COMPANY OF HARTFORD, CONNECTICUT, a corporation,

(Garnishee) Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

293 I.A. 335

FEB 2 1938

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is a garnishment proceeding which was brought by one Jim Brooks for the use of Minnie Seiden and Louis Seiden against the Hartford Accident and Indemnity Company of Hartford, Connecticut, a corporation, garnishee, upon two judgments, one for $1,500 and the other for $3,500, respectively, growing out of injuries sustained in an automobile accident. Brooks was driving the automobile at the time the Seidens were injured.

This garnishment proceeding, based on said judgments, was brought by the real plaintiffs against the defendant upon an automobile insurance policy issued by the said defendant in favor of a man by the name of Thomas F. Gallagher, the employer of said Jim Brooks.

The evidence shows that said Jim Brooks was engaged by Thomas F. Gallagher as a private chauffeur and the stipulation of the parties shows that at the time of the accident he was so employed and the said judgments were rendered against Jim Brooks. Counsel for appellants state that the evidence in the original cases in which the judgments were entered and which brought out the fact that Jim Brooks was employed as a private chauffeur by Gallagher, did not establish

that Brooks was the agent of Gallagher.

The automobile driven by Brooks was owned by Gallagher and counsel states that the garnishment proceedings are based upon the presumption that Gallagher had given his consent to Jim Brooks to use his automobile, which automobile caused the injuries sustained by plaintiffs.

As near as we can gather from the limited abstract, the proceeding is based upon a paragraph in the policy issued to Gallagher by the insurance company, by which language the company insures against liability incurred by any one who may drive the automobile with Gallagher's consent; the evidence shows that when Gallagher got out of his automobile he instructed the chauffeur to take it to the garage, but instead of doing so the chauffeur drove the automobile in other sections of the city in such a negligent manner as to injure the plaintiffs, which resulted in the judgments which were entered against Brooks.

The points and authorities cited by counsel for plaintiffs do not aid us in determining just what issues are here involved. Plaintiffs argue rather extensively and cite authorities supporting their right to maintain this suit. The right to maintain this suit is admitted by the garnishee - appellee in its brief.

Plaintiffs contend that the trial court refused to allow the calling of the said Thomas F. Gallagher, owner of the automobile, as a hostile witness and also erred in refusing to admit in evidence the deposition of said Gallagher as a hostile and adverse witness. As these claimed errors are not referred to by counsel in his points and authorities or in his argument and were apparently abandoned, under the rules of this court we cannot now consider them.

It appears from the abstract, however, that Gallagher's deposition was taken under the Practice Act. In that deposition Gallagher denied ever having given consent to Jim Brooks to drive

his automobile. When the case was called for trial, plaintiffs' counsel offered that deposition in evidence, to which objection was had by appellee. That deposition contained nothing of consequence but Gallagher's denial of his consent having been given to Brooks. Just why plaintiffs wanted to introduce that deposition in evidence, as such evidence was almost conclusively against them, and just why appellee objected to this evidence, when it was greatly in its favor, we do not comprehend.

The trial court in not permitting Gallagher to be called as a hostile witness was correct. The trial judge told counsel for plaintiffs that he could call Gallagher as his own witness, but counsel refused so to do. To designate Gallagher as a hostile witness was not justified by the record.

For the reasons herein given the judgment of the Superior Court is affirmed.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

39622

JOHN KERN,

Appellant,

v.

MID CITY ELECTRICAL SERVICE INC.,
a corporation,

Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

293 I.A. 635

FEB 2 1939

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

This case appears to be a suit to recover for personal injuries sustained by the plaintiff, John Kern, which injuries were caused by the defendant.. But, as the pleadings are not set forth in the abstract, we are unable to know definitely just what charge the plaintiff makes against the defendant..

One of the errors assigned by plaintiff is that the court improperly permitted to be admitted in evidence a certificate of the superintendent of the Santa Fe Railroad certifying as to the date of a witnesses's employment. The abstract fails to show a copy of the certificate, but it does show that the plaintiff consented that the same be read to the jury.

Plaintiff also claims that the court erred in refusing to admit in evidence a card presented to the plaintiff's wife by a witness, whom she claimed stated, that if the case was not given to a certain lawyer, he would testify against plaintiff's claim. This card is not set forth in the abstract. Therefore, we do not know what it contained.

Plaintiff also claims that the court made improper and prejudicial statements concerning the evidence in the presence of the jury and thereby committed error.

The abstract does not disclose that plaintiff's objections were called to the attention of the court, in order that the court might correct the errors if there were any, and this question cannot be raised here for the first time.

Plaintiff also claims that the court erred in reopening the defendant's case after its close to permit the testimony of another witness. The conduct of a trial, and the order in which evidence may be introduced, is largely within the sound discretion of the trial court. Chicago City Ry. Co. v. Carroll, 306 Ill. 318, 327.

A verdict was returned by the jury for the defendant. Inasmuch as the abstract in this case does not set forth the necessary information, with sufficient evidence to show upon what the plaintiff's claim is based or wherein the errors lie, we must affirm the judgment of the Superior Court.

JUDGMENT AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

39732

NATIONAL LEAD COMPANY, a corporation,
Appellee,

v.

THE NORLIPP COMPANY, a corporation,
Appellant.

594

APPEAL FROM
MUNICIPAL COURT
OF CHICAGO.

293 I.A. 635

1938

MR. JUSTICE DENIS E. SULLIVAN DELIVERED THE OPINION OF THE COURT.

A suit was commenced by the National Lead Company in the Municipal Court against the defendant, The Norlipp Company, in an action on the assignment of an account and the cause was tried before the court without a jury. The court's finding was in favor of the defendant. Plaintiff made a motion for a new trial which was granted and the finding in favor of defendant was set aside by the court on August 6, 1937.

We are asked to review and reverse the order of the trial court in granting the motion for a new trial and the placing of the cause upon the trial calendar.

The abstract filed by defendant - appellant is not in narrative form, as required by Rule 6 of this court, nor is it complete. It consists of a series of selected questions and answers taken verbatim from the report of the proceedings and is very confusing. However, we have carefully gone into the evidence in this case and we find that it is principally a controverted question of fact and, concerning the admission of evidence in relation thereto, on which many rulings were requested and had.

The abstract and record disclose that serious errors were committed against plaintiff by the trial court in its rulings upon the admission of evidence and that they were apparently sufficiently grave in the opinion of the trial judge upon reviewing them to warrant a new trial so that the errors could be corrected.

A point is made that the trial judge decided the case first for the defendant, but that upon a motion for a new trial the judge reversed his finding and granted a new trial.

Trial judges as well as reviewing courts are engaged in the administration of justice and the mere fact that the trial judge upon reflection and further consideration, saw fit to change his decision, xxxxx he, no doubt, was of the opinion that justice demanded that a new trial should be had. It was his duty to grant a new trial when convinced his former rulings and findings were prejudicial error.

The trial court was engaged several days in the trial of the cause and a number of witnesses appeared for plaintiff and defendant. Numerous documents were before the court for consideration, but neither side produced any evidence which was in any sense conclusive. The trial judge having seen the witnesses and heard the evidence, xx was in a much better position to judge whether or not justice would best be served by a retrial of the cause than could a court of review.

Where the evidence of the opposing parties is close, the rulings of the trial court must be particularly free from error and, as before stated, xxx where errors were made against plaintiff which manifestly, in the opinion of the trial judge, could only be corrected by a retrial, we cannot say that the trial judge erred in granting a new trial. Trial courts should not be unduly restricted in granting new trials, if by so doing the administration of justice is better accomplished.

For the reasons herein given the order of the Municipal Court in granting a new trial is affirmed.

ORDER AFFIRMED.

HEBEL, P.J. AND HALL, J. CONCUR.

39940

GERTRUDE M. SCHULER,
Appellee,

v.

LEAH G. BEEZLEY et al.,
Defendants.

ON APPEAL OF ALBERT M. WOLF, ROBERT T. FELTUS, OTTO W. FICK, ERNEST L. HARTIG and THE BOARD OF EDUCATION OF THE OAK PARK AND RIVER FOREST TOWNSHIP HIGH SCHOOL DISTRICT NO. 200,
Appellants.

INTERLOCUTORY APPEAL
FROM SUPERIOR COURT
OF COOK COUNTY.

293 I.A. 635

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

Gertrude M. Schuler, a taxpayer, filed a complaint against the Board of Education of the Oak Park and River Forest Township High School District (hereinafter called the board), and all five members thereof, seeking to restrain the board from entering into a contract for the purchase of a library and certain laboratory equipment from the Oak Park Junior College, a privately endowed institution, and expending funds of the board therefor. A temporary restraining order issued, as prayed. This appeal is prosecuted under sec. 78 of the Civil Practice act (chap. 110, Ill. Revised Statutes, State Bar Ass'n Edition, 1937) by the board and four of its members from an interlocutory order entered by the chancellor denying their motion that the temporary injunction be dissolved.

Leah G. Beezley, the fifth member of the board, filed an answer admitting the allegations of the complaint, but disclaiming

responsibility on her part for the acts charged therein. She did not join in the motion to dissolve the temporary injunction, nor does she join in this appeal.

The question presented is whether the complaint states a sufficient cause of action to justify the issuance of a temporary restraining order. It appears from the essential allegations of the complaint that in May, 1937, the state legislature passed "An Act in relation to the establishment and management of Junior Colleges in certain school Districts" (Ill. Revised Statutes, State Bar Ass'n Edition, 1937, chap. 122, sec. 99.1, et seq., p. 2876), which permits but does not require high school boards to establish and maintain public junior colleges. Some 4,000 residents of the high school district petitioned the board to exercise the power conferred and to establish a junior college. The board accordingly employed a survey committee of prominent educators to investigate the matter and recommended the establishment of a junior college. Nevertheless, the majority of the defendants concluded that because of economic and other considerations it would be unwise, impractical and exceedingly costly to inaugurate a junior college program for the district "at this time."

It is alleged that in 1933 an Illinois corporation, not for profit, known as "The Oak Park Junior College" (hereinafter referred to as the college) was organized and that it maintained facilities for junior college work, with an enrollment of 110 students, a majority of whom reside in the high school district in question; that the college is managed by a board of directors of prominent citizens of Oak Park and River Forest, and is nonsectarian.

It is further alleged that July 1, 1937, the college had a deficit of over $5,000, and that its ability to resume operations in September, 1937, was in grave doubt; that it required laboratory

equipment, costing approximately $3,500, and some $4,500 in cash to meet outstanding indebtedness, including unpaid salaries; that ostensibly, for the purpose of developing further the long range needs and requirements of the community for a junior college, a majority of the defendants concluded to assist the college by a grant of funds belonging to the board; and that the board was advised that this proposed action would be illegal as in violation of sec. 20 of Article IV of the constitution of Illinois, which contains the following provision: "The State shall never pay, assume or become responsible for the debts or liabilities of, or in any manner give, loan or extend its credit to or in aid of any public or other corporation, association or individual."

It further appears from the averments of the complaint that the college possessed a library of some 3,956 volumes, of which 1,502 were purchased at an average cost of $1.12 a volume; that it also possessed 2,454 miscellaneous volumes which it had received by way of publicly solicited gifts; that the last mentioned volumes were for the most part used textbooks of little intrinsic value, and little, if any, value for the use of high school students, and that the 1,502 volumes purchased are likewise unsuitable for use by high school students; that defendants had made appropriations for the purchase of books needed in the high school operated by them, and from time to time such purchases were made as were deemed necessary; that at the time in question there was an unexpended balance of such appropriation because the need for additional purchases had not arisen; that the high school is well supplied with laboratory equipment, and that only a small fraction of the laboratory equipment, costing about $3,500 required by the college, is needed by or suitable for use in the high school.

The complaint avers further that notwithstanding the fact

defendants were advised that a grant to the college of moneys belonging to the board of which they were members would be illegal, a majority of them conceived the plan by which they seek to accomplish the identical result by doing indirectly what they were advised would be illegal for them to do directly; that at a special meeting of the board, held October 11, 1937, the board, by a vote of three of its members, adopted a resolution the validity of which is here questioned. The preamble of the resolution consists of a lengthy report of the investigation made into the question whether the board should exercise the power conferred by the enabling act of the legislature and establish a junior college. It points out that the exercise of the right would involve the expenditure of hundreds of thousands of dollars, and therefore the permissive right granted was too serious a matter to be exercised lightly; that careful consideration was given to the recommendations of the survey committee employed by the board, based on the desirability of establishing a junior college as viewed by the educators and not on any practical need of the community. After discussing costs the preamble states an estimate of $300,000 as the cost of a new building and annual expenditures for maintenance approximating $75,000 to $100,000. The preamble concludes that the majority of the board are therefore agreed that on the basis of present facts and information it would be unwise, unnecessary and impractical, as well as exceedingly expensive, to inaugurate a public junior college program for the high school district "at this time;" that to develop further definite facts, and in order to determine the long range needs and requirements of the community, the four board members believe it would be wise and proper to assist in an experimental program of investigation "and that this can best be done by co-operation with the present established junior college;" that although the four members of the board were definitely opposed to a junior college program at the

time, nevertheless they recognize certain of the problems confronting a number of students and parents sympathetic thereto, and that as a matter of public policy they believe the board can and should do certain things to assist in meeting and helping to solve the problem, and that this may be accomplished "in connection with the experimental program," which they believe will definitely prove either that the community needs are sufficiently large to justify a public junior college or are so limited that they can be adequately taken care of by the Oak Park Junior College, which can then be continued as a permanent civic institution; that the experimental program proposed would render the annual expenditure of $75,000 to $100,000 for additional expenses unnecessary, and provide an "interim experimental program" until such time as taxable valuations are sufficiently increased to produce adequate revenues or until the general assembly further amends the law to permit the charging of tuition; that the experimental program proposed would entail expenditure of a maximum of $8,000, which is characterized not as a donation, inasmuch as the property shall belong to the high school and the amount invested is represented by tangible assets having a substantial cash value if sold; and that if for any reason the college is discontinued, practically all the equipment and laboratory is suitable for and useful for regular high school work and is worth its full cost to the high school, so that no loss would be entailed. The resolution concludes that in the opinion of the four board members the continued operation of the college, and the opportunity for observation and study thereof by the board, will afford valuable and practical means of investigating the facts likely to influence the board in determining its ultimate course of action with respect to a public junior college.

The resolution authorized the execution of a contract between the board and the private college, providing for the purchase of the

[illegible]

The resolution authorized the expansion of [illegible]
the board and the private colleges [illegible]

library and laboratory equipment, both of which shall be available for the use of the students of both the high school and the college, and in consideration therefor the college on its part agrees to co-operate with the board during the current school year in the development of information and facts that may be useful to the board in determining its ultimate course of action.

The complaint avers that the proposed action is a subterfuge and therefore illegal and void, in contravention of the constitution of the State of Illinois; that defendants are about to act under the resolution adopted; that plaintiff owns property in the district subject to texation, and would be irreparably damaged by the proposed action of the board, and seeks therefore to restrain temporarily, and after a full hearing, permanently, the proposed action of the board.

It is urged that the contract by which the board proposes to purchase the library and laboratory equipment from the college amounts to a donation of public money and the lending of public credit in aid of a private college in violation of sec. 20 of Article IV of the constitution. No charge of fraud is made against the board, but it is contended that the consideration stipulated on the part of the college is obviously a subterfuge for sufficient support to the agreement to give it the appearance of a valid transaction in the public interest. The board concedes, of course, that public funds may be paid out only for public purposes, and defendants do not contest plaintiff's right as a taxpayer to object to the expenditure of school funds for anything but a public school purpose. Their counsel argue, however, that the appropriations required by the agreement with the college were not in violation of sec. 20 of Article IV of the constitution, but that when the legislature conferred power on the board to establish a public junior college the authority to make whatever investigation the board deemed necessary to determine whether it ought to exercise that power

was necessarily implied and that the expense of such investigation was properly payable out of school funds; that one of the means chosen for determining whether the board ought to exercise the power given it by the legislature was a study of the actual operation of the existing private college as a going institution during the ensuing year, and that this was an excellent and economical means of investigating factors likely to influence the board in determining whether or not ultimately to establish a public junior college.

When the legislature conferred power on the board to establish a junior college, it placed upon the board the responsibility of making a decision under the statute. That necessarily entailed an investigation to determine whether or not a junior college was suitable for the needs of this particular community, and obviously the expense of such an investigation was necessarily implied in conferring upon the board the responsibility of making the choice. (Ill. Revised Statutes, State Bar Ass'n Edition, 1937, chap. 122, sec. 99.1, et seq., p. 2876.) It would seem to follow logically that where the school board has power to perform an act, it also has a discretion as to the means to be used in the accomplishment thereof, provided it does not contravene the existing law, and there is a presumption of the validity of the board's action, with which courts will not interfere unless there is a clear showing that the means employed are either unlawful or fraudulent. The majority of the defendants had not definitely decided either for or against a public junior college. In spite of the recommendations of the investigating committee, their decision against embarking upon an expensive enterprise at the time was merely tenative, and they wanted more light on the subject. To that end they proposed, through close observation of the existing private college, to study the needs of the community for the purpose of ultimately determing whether a junior college ought to be established in the district. The

college was in financial distress, and it seemed highly probable that this avenue of necessary information would be closed unless some aid was given to the college. Therefore, in order to keep the college open for experimental purposes the board by resolution authorized the contract whereby the college was to obtain $4,500 in cash through the sale of its library to the high school. This library and laboratory equipment was to be made available to the students of both institutions until July 1, 1938, when all right to such use by the college students was to terminate. The college on its part was required by the agreement to co-operate with the board in developing information that might ultimately be available to the board in determining its course of action. Plaintiff characterizes the transaction as a subterfuge, but we believe it had a direct bearing on the implied powers of the board to investigate and determine before exercising the power vested in it by the legislature, and that the contract between the board and the college may fairly be characterized as being for a public purpose. To establish a junior college would have entailed the expenditure of vest sums of money, with an annual appropriation for maintenance many times greater than the $8,000 appropriated for the experimental purpose, and until the board was definitely satisfied of the need for a junior college and that the revenue from taxes from this district would justify such an undertaking, it was manifestly more prudent for it to study the situation through the means employed than to go blindly into an undertaking of those proportions without first ascertaining the need therefor and the possibility of being able to raise the necessary amount.

The courts of this state have heretofore construed sec. 20 of Artice IV of the constitution under similar circumstances. In Hagler v. Small, 307 Ill. 460, a taxpayer sought to enjoin certain state officers from payment authorized by the Soldier's Compensation

act, on the ground, among others, that in providing for payment of money to individuals, the statute violated sec. 20, Article IV of the constitution. The court held the act not subject to this objection, however, and particularly pointed out that if the purpose of the act lies within the power of a state the credit of the state may be used in furtherance thereof, saying (p. 473): "Such purpose is not defeated by the fact that individuals benefit thereby. The execution of a public purpose which involves the expenditure of money is usually attended with private benefits."

In Boehm v. Hertz, 182 Ill. 154, cited and relied upon in Hagler v. Small, the court upheld an appropriation to the Illinois State Normal University, on the ground that while the university was a private corporation it was used as an agency of the state to increase the efficiency of the public schools by the training of teachers therefor, and that although the private corporation benefited by the gift the purpose of the appropriation was public and that the act providing for it did not come within the prohibition of sec. 20 of Article IV of the constitution. Under this decision we think the board might have made a direct appropriation to the college for experimental purposes without violating the constitutional provision.

In Hagler v. Small the court held that the public purpose in the donation of state funds to World War veterans, as authorized in the act, was to be found in the consideration that they "incite patriotism, encourage the defense of the country in future conflicts and promote the public welfare," and it emphatically indicated that the judgment of the legislature as to what is for the public good, and what constitutes public purposes, will be accepted by the courts "in the absence of a clear showing that the purported public purpose is but an evasion and that the purpose is, in fact, private."

Defendants' counsel point out in their brief that beginning

with 1909, and extending though the year 1937, the legislature has repeatedly appropriated public moneys to such private corporations, associations or individuals, as Illinois State Horticultural Society, Illinois Dairymen's Association, Illinois Firemen's Association, Illinois State Poultry Association, Milk Producers' Institute of Illinois, Illinois Live Stock Breeders' Association, and Illinois State Bee-Keepers' Association, and that the attorney general in 1909, in an opinion, justified these appropriations as not offending against sec. 20, Article IV of the Constitution, because they were made for public purposes, and so it appears that for a period of almost thirty years the attorney general's opinion has been concurred in and acted upon by legislatures, governors and subsequent attorney generals.

Plaintiff's counsel cite Loan Association v. Topeka, 20 Wallace (87 U.S.) 655, in support of their contention that the contract in question amounted to a donation of public money and was in violation of the constitutional provision. In that case the court held that a state may not donate public funds to aid a private bridge fabricating corporation. This was, of course, a clear violation of the principle that public funds may not be used for purely private purposes, and the case may be distinguished upon that ground.

It is argued by plaintiff's counsel that the assistance to the private college in this proceeding was not necessary because there are many public junior colleges in the vicinity of the school district in question and other private colleges from which the board could have gained the information sought through this experimental enterprise. There is nothing in the record, however, to justify that conclusion, and even though it were a fact it does not necessarily follow that the success or failure of public junior colleges in other communities would definitely solve the problem affecting the economic and cultural conditions in this particular district.

Counsel for the board argue that sec. 20 of Article IV of the constitution applies to the legislature only and not to school boards, even though in one sense a school board is an agency in the state created to fulfill the constitutional obligation imposed on the legislature to provide a common school education. This contention finds support in Hagler v. Small, supra, wherein the court, after referring to sec. 18 of Article IV, which limits the power of the legislature to incur debts against the state, said (p. 471): "Said section 20 was drafted as a part of the constitution for the purpose of more fully accomplishing the purposes of section 18. This is clearly indicated by the following words taken from the address of Hon. Joseph Medill, a member of that convention: 'We were startled the other day by a statement from my colleague, Mr. Coolbaugh, that he had read in the Auditor's report that the present municipal indebtedness of this State, including counties, townships and cities, had swollen to the enormous amount of $40,000,000. I can see, like a creeping shadow on the wall, the time approaching when a log-rolling scheme will be brought into some near future legislature to saddle on the State of Illinois the assumption of that $40,000,000, - perhaps, twice, aye! thricetold! I therefore regard this section [section 20] as of the intensest importance, - the ounce of prevention that some day will save more than a pound of cure.'" From this it would appear that the framers of the constitution had primarily in mind the placing of limitations upon the legislature.

We are of the opinion that the action of the board was not in violation of sec. 20, Article IV of the constitution, and in the absence of fraud or a showing that the expenditure was illegal, the court will not question the discretion of the board in entering into the contract with the college. Therefore, the judgment of the

Superior court is reversed and the cause is remanded with directions that the motion to dissolve the preliminary injunction be allowed.

JUDGMENT REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Keanlan and Sullivan, JJ., concur.

39312

INDUSTRIAL REFUSE DISPOSAL COMPANY, a corporation,
Appellee,

v.

CITY OF CHICAGO, a municipal corporation,
Appellant.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Industrial Refuse Disposal Company, plaintiff, brought an action to recover damages resulting from breach of a contract entered into with City of Chicago, defendant, for removal of waste materials. Trial was had by jury and at the close of the case the court submitted but one form of verdict, finding the issues for plaintiff and leaving only the amount of damages to be determined by the jury. A verdict was returned in favor of plaintiff for $118,600, upon which judgment was entered. This appeal by the city followed.

Under the contract sued upon plaintiff, in consideration of payments to be made by the city, agreed to furnish all labor, tools, equipment and facilities to receive, transport by rail and dispose of waste materials, other than garbage, delivered by the city to loading platforms at the following locations in Chicago: (1) 40th street and South Ashland avenue; (2) 36th street and South California avenue; (3) Chicago and Crawford avenues; (4) Kedzie avenue and School street; and also to receive waste materials from the city for disposal, without reloading, at the following dumping sites in Chicago: (1) Narragansett and Fullerton avenues; (2)

19th and South Lincoln streets.

The city made deliveries to plaintiff of waste material at 40th street and South Ashland avenue and also at 19th and South Lincoln streets, for which it paid plaintiff the respective sums of $69,462.50 and $65,448.22. At 36th street and South California avenue plaintiff never constructed a loading platform, and at Narragansett and Fullerton avenues plaintiff was unable to make arrangements with the owners of the land, and therefore provided no facilities for receiving refuse. Consequently, only two of the aforementioned locations are involved in this action, namely, Chicago and Crawford avenues and Kedzie avenue and School street.

The agreement, dated June 16, 1931, was by its terms operative for a period of six months, namely, from July 1 to December 31, 1931, subject to the right of the city for an extension to June 30, 1932. However, since the city did not exercise its option for an extension the contract was effective only for the six months period. Under the contract plaintiff was required to receive the waste material and to furnish facilities for loading and transporting it from the loading stations specified in the agreement. This necessarily required that agreements be made by plaintiff with railroad companies for the construction of the loading platforms and for the use of their rights-of-way, and to that end plaintiff expended $13,668.59 for construction of the platform at Crawford and Chicago avenues in preparation for receiving refuse under the contract, and also $14,638.10 for construction work at Kedzie avenue and School street. There is evidence also to prove plaintiff expended $12,056.10 at Cary, Illinois, for constructing a dump where the refuse was ultimately to be deposited, but in view of the fact that this contract was entered into between the Illinois Development Corporation (evidently plaintiff's subsidiary) and the Chicago & Northwestern Railroad Company for work at Cary, and was

dated April 18, 1932, almost four months after the expiration date of the contract in controversy, we do not believe this expense was a proper item of damages for the city's breach.

Notwithstanding the undertaking of the city to deliver the waste material to the loading stations in controversy, there was a total breach of the agreement by the city in failing to deliver any material to these stations, and the record is silent as to the reason for the failure of the city to make such deliveries. After the contract was executed by the parties the two loading stations in question were inspected by the commissioner of public works, by the finance committee of the city council, and by the engineers of the department of public works, and were approved as being adequate for discharging the work covered by the contract, and Col. Sprague, commissioner of public works when the contracts were made, testified that "it was the intention of the department to cause deliveries to be made at the stations where deliveries were subsequently not made."

Under its contract with the railroad company plaintiff agreed, upon any termination of the contract, to remove all construction from the railway property and restore the premises to the same condition as prior to the installation. Upon the city's breach of the contract plaintiff was required under its agreement with the railroad company to remove the loading platforms and adduced evidence upon the trial that the estimated cost of restoring the property at Crawford and Chicago avenues was $27,500, at Kedzie avenue and School street, $25,950, and at Cary, Illinois, $5,000, and these three items were presumably included in the jury's verdict. The remaining element of damages consisted of the net profit that plaintiff would have made in handling the waste material during the life of the agreement. This item is based on the average tonnage a day, at the rate of 6-1/4¢ a cubic yard, which was shown by plaintiff's witnesses to be the net profit for handling the waste material. Leonard P. Turner, a witness for

the city, testified that from July 1 to December 31, 1931, aggregating 112 working days, there would have been delivered to the Chicago and Crawford avenues station 155,120 cubic yards, or an average of 1,385 yards a day; and at Kedzie avenue and School street 1,041 cubic yards a day for 112 days, or an aggregate of 116,952 cubic yards. The tonnage that would have been delivered to both stations, according to Turner's testimony, would have aggregated $272,072 cubic yards. There was some discrepancy in the testimony, however, as to when these two stations were ready to receive waste materials. It appears from the evidence that the Chicago and Crawford avenues station was not ready until July 15, and the Kedzie avenue and School street station until about August 1.

It is first urged by the city that its agreement with plaintiff was executory and unenforceable for lack of mutuality, as well as for lack of certainty and definiteness. These contentions are based primarily on the following provision of the contract: "Nothing contained in this contract shall be construed as an obligation on the part of the city to restrict or discontinue the operation of, or the delivery of waste material to, the City Incinerator located at 1146 North Branch street or any other incinerators which may be built by the City of Chicago during the terms of this contract, or to restrict the City from using waste material for filling in streets, alleys or low lands conveniently located." This contention was not made at the trial of the case, and since the law is well settled that a party will not be permitted to urge objections in a court of review for the first time which were not raised or considered in the trial court (Holmes, trustee, v. First Union Trust & Savings Bank, 362 Ill. 44; Dacy, adm'x, etc. v. Goll, 242 Ill. 606; Morey v. Brown, 305 Ill. 284) we hold that the city is precluded from urging the invalidity of the contract at this time.

It is next urged that there is no basis in the record for the amount of the damages awarded plaintiff by the jury. This constitutes the real controversy between the parties. There appears to be no dispute as to the general rule relating to the measure of damages in cases of this kind. The law is well stated in United States v. Behan, 110 U. S. 338, as follows (p. 344): "The prima facie measure of damages for the breach of a contract is the amount of the loss which the injured party has sustained thereby. If the breach consists in preventing the performance of the contract, without the fault of the other party, who is willing to perform it, the loss of the latter will consist of two distinct items or grounds of damage, namely: first, what he has already expended towards performance (less the value of materials on hand); secondly, the profits that he would realize by performing the whole contract."

Since there is no substantial dispute as to the respective items of $13,668.59 for constructing the loading platform at Crawford and Chicago avenues, and $14,638.10 for the platform at Kedzie avenue and School street, these two items were properly included in the damages awarded by the jury. The city argues that plaintiff made an agreement with the railroad company to maintain these loading stations for a period of five years, and that they could have been used for the removal of waste material by other parties than the city, and therefore the cost of construction should not have been included as an element of damage. However, plaintiff had agreed to furnish "equipment and facilities to receive, transport by rail, and dispose of waste materials," and these loading platforms were specifically constructed in pursuance of the contract to handle the city's refuse, and not for any other purpose. They were inspected and approved by the city officials, and it now idle to argue that they could be used for some other purpose and the record is totally devoid of any evidence to sustain that contention. We have already discussed the expense

entailed for construction work at Gary, Illinois, and hold that this was not done in pursuance of the agreement, since the contract for the work for the Gary dump was not entered into until almost four months after plaintiff's agreement with the city had expired.

There was a conflict in the evidence as to the two items of $27,500 and $25,950, being the estimated restoration costs at Crawford and Chicago avenues and Kedzie avenue and School street. The building of these platforms on the railroad's rights-of-way necessitated the raising of the railroad track, which constituted a considerable item. The estimates for restoration included the lowering of the track to its original level, and witnesses for the respective parties differed as to the estimated cost for doing this work. One Daniel J. O'Donovan, called on behalf of the city, testified that he was a general contractor and builder and estimated the cost of restoring the property, including the replacing of railroad tracks at the respective figures of $13,796.20 for the Kedzie avenue and School street station, and $17,755 for Chicago and Crawford avenues. Plaintiff's witnesses, as heretofore stated, estimated the expense at $27,500 and $25,950 respectively. From an examination of the evidence it is difficult to understand why the estimates for restoration should so far exceed the cost of construction, and no plausible explanation is made in the record for the difference. Consequently, we regard the estimate as given by plaintiff's witnesses as excessive, and while it is not the function of the reviewing court to determine the facts, we believe the verdict, so far as it included the aggregate amount of plaintiff's estimates as to these two items, was excessive. Plaintiff's estimates on these two items aggregate $53,450; defendant's $31,551; the difference being $21,899.

There was substantially no difference as to the item of damages constituting the net profit plaintiff would have made if the city had

not breached the contract, based upon the yardage of waste material that would have been delivered to these two stations during the period in question. Plaintiff's testimony as to these damages was $18,669. Defendant disputes this figure and argues that certain items should have been included in the operating expense, which would have decreased the net profit. From an examination of the evidence pro and con, we are satisfied, however, that plaintiff's proof as to the actual damages was substantially correct.

At the trial of the cause plaintiff sought to recover interest on the cost of constructing the two platforms in question and proved this item as amounting to $8,577.10. With all the other elements of damage, the total amount claimed by plaintiff was $127,661.39. The jury returned a verdict for $118,600, which would seem to indicate that it deducted the interest item from the amount of plaintiff's claim.

The remaining contention of the city is that if the instrument sued on were an enforceable contract plaintiff should not have been allowed to recover more than the liquidated damages for which it provided. This contention is based upon the following provision of the agreement: "Liquidated Damages: In case the City plans to make no deliveries to a particular loading station, the Commissioner of Public Works shall notify the contractor of such contemplated action prior to 3:00 P.M. of the preceding day. In case the contractor is unable to receive deliveries from the City for any day on account of breakdown or other justifiable cause, he shall so notify the Commissioner of Public Works prior to 3:00 P.M. of the preceding day. Should the Commissioner of Public Works fail to notify the contractor as herein provided, the contractor may include in his bill for removal the sum of $100 for each such day, as liquidated damages. Should the contractor fail to notify the City of his inability to receive deliv-

eries from the City at a particular loading station, as herein provided, then a deduction of the sum of $100 for each such day shall be made from the bills of the contractor as liquidated damages. Failure of the City to deliver or of the contractor to receive waste material, caused by strikes, acts of providence or the public enemy or for any other cause beyond the City's or contractor's control, the liquidation damage provision of $100 herein provided shall not apply. In case of undue delay to City tractor-trailer trains and trucks at the loading stations, there shall be deducted from the contractor's bill as liquidated damages the sum of $1 for each fifteen (15) minute delay for each tractor-trailer train and truck beyond the initial fifteen minute delay. Continued failure on the part of the contractor to receive waste material from the City at a loading station, or continued failure to unload City vehicles promptly, leading to congestion of the City's streets and loss of time by the City's vehicles and forces, as provided in these specifications, shall constitute a cause for cancellation of the contract by the City." From a careful reading of this provision it clearly appears to have been the intention of the parties to provide liquidated damages only for lack of proper notice of occasional failure to deliver or receive waste material. This conclusion is supported by the last paragraph of the foregoing quotation.

After a careful consideration of the record we have concluded that the only elements of damage which cannot be sustained are the construction and restoration costs of the dump at Cary, Illinois, estimated at $12,056.10 and $5,000, respectively, and the amounts estimated by plaintiff's witnesses for the restoration of the premises at the two sites where the loading platforms in controversy had been constructed. The most that should have been allowed for the latter two items was an

aggregate of $31,551 (the city's estimate) instead of $53,480 (plaintiff's estimate). Therefore, if plaintiff consents to the entry of a remittitur for these items aggregating $38,955, within thirty days, the judgment of the Superior court will be affirmed: otherwise the judgment will be reversed and the cause remanded for a new trial.

AFFIRMED UPON REMITTITUR BY PLAINTIFF OF $38,955; OTHERWISE JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

Scanlan and Sullivan, JJ., concur.

39513

THE TELEGRAPHERS NATIONAL BANK OF ST. LOUIS, MISSOURI,
Appellee,

v.

O. A. RAWLINS, ANSON G. HURLEY, HATTIE M. FLEENER et al.,
Appellants.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

293 I.A. 636

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

September 20, 1934, the Telegraphers National Bank of St. Louis, Missouri, plaintiff, recovered a judgment in the municipal court against O. A. Rawlins of $1,163.55 and costs. Execution issued and was returned nulla bona. Thereafter, plaintiff filed a creditors' suit in the superior court against Rawlins, Anson G. Hurley and Hattie M. Fleener, seeking to set aside conveyances of real estate by Rawlins to the other defendants, alleged to be in fraud of creditors. Upon issue joined the cause was referred to a master in chancery, a hearing was had, and pursuant to the argument on exceptions to the master's report, the exceptions were overruled and a decree was entered in favor of plaintiff ordering Hurley and Fleener to reconvey certain properties to Rawlins. This appeal followed.

It appears from the evidence that some time in 1928 Rawlins borrowed $2,000 each from Anson G. Hurley and Hattie M. Fleener, and also $1,600 from Mrs. Fleener, her mother. Notes were given to each of these persons evidencing the loans. Plaintiff also held some of Rawlins's notes, secured by collateral in the form of South American stocks and bonds which were then worth more than the face value of

the notes. It appears from Rawlins's testimony that in August, 1931, he instructed plaintiff, as holder of his notes and collateral, to sell the collateral, because, as he feared, "England might go off the gold standard." Subsequently, about September 20, 1931, England did go off the gold standard, and the value of Rawlins's collateral dropped below what he owed. Plaintiff thereupon sold the collateral and instead of leaving a surplus of some $2,600, as Rawlins contends he would have had if the securities had been sold in August when he so ordered, there was a deficiency between the face of the notes and the proceeds of the sale, upon which the creditors' suit is predicated.

Rawlins evidently anticipated that his collateral would be sold in September, 1931, and in order to protect Hurley and the Fleeners for the money he owed them, he and his wife executed warranty deeds to two parcels of real estate, one to Hattie M. Fleener and her mother, and the other to Anson G. Hurley. These deeds were filed for record immediately in the recorder's office. It appears from the record that Hattie M. Fleener is Rawlins's cousin, and Hurley his nephew.

The only evidence adduced before the master was the testimony of Dr. Rawlins, the principal defendant, and one J. S. Pahm, both of whom were called as witnesses on behalf of the plaintiff, together with certified copies of the deeds to the parcels of land in controversy and some other documentary evidence.

Defendants contend that upon the authority of Luthy & Co. v. Paradis, 299 Ill. 380, the creditors' suit should have been dismissed; that plaintiff failed to maintain by clear and convincing evidence the burden of proving fraud, as charged in the complaint; that a debtor may prefer one creditor over another, in the absence of fraud; and that a deed absolute in form, but which is intended merely as security for

a debt, is not void as to the grantor's creditors unless there was actual fraud in which both the grantor and grantee participated.

In order to draw an analogy between the case of Lathy & Co. v. Paradis, and the circumstances of this case, it becomes necessary to examine the testimony of the only witnesses produced at the hearing, Rawlins and Bahm. Rawlins testified in substance that he had practiced medicine in Chicago since 1920, with offices at 25 East Washington street, and was connected with the Lutheran Memorial Hospital; that the deeds in question were made prior to the entry of the judgment in favor of plaintiff against Rawlins, but while the indebtedness of plaintiff was still outstanding; that he had been indebted to Hurley and the Fleeners since 1928 for considerable sums of money obtained from them in 1928 which he spent and never repaid; that subsequent to 1928 he had lost over $100,000 and incurred numerous debts, including those to the Fleeners and Hurley. Dr. Rawlins said frankly that he executed the deeds in question to protect Hattie M. Fleener, her mother and Anson Hurley for the money he had borrowed from them; that he did not know definitely that the collateral on deposit with the bank would be sold, but he anticipated the sale and desired to protect those to whom he had been previously indebted.

J. S. Bahm, also called as a witness on behalf of plaintiff, testified that he was employed by the Great Lakes Mortgage Corporation, correspondent for Metropolitan Life Insurance Company, who held a loan on one of the properties in question. From documentary evidence produced it appears that Metropolitan Life Insurance Company had a first mortgage on one of the parcels of land, executed July 13, 1926, in the amount of $5,000, which had been reduced by monthly payments to $3,200. This loan matures November 1, 1941, and the interest thereon has been paid up to the time of the hearing.

Upon this evidence the decree which followed almost verbatim the findings of the master finds that the pleadings of the defendants and the testimony of Rawlins show a wide divergence as to the sums owed by Rawlins to his relatives; that the court takes into consideration the fact that no documentary evidence of any or either of the defendants has been introduced in support of their various contentions; that none of the grantees testified; that as to Rawlins it is inconceivable that if the transactions he alleges were entered into the "best evidence" necessary to support his contention would not be in existence and easily and conveniently available to prove his position; that the transfers or conveyances of real estate to the Fleeners and Hurley were colorable, as far as the grantees are concerned, and fraudulent as to plaintiff and other creditors of Rawlins; that the title was taken and held by the grantees with the intention to hinder and delay Rawlins's creditors; that no actual, valid and sufficient consideration underlaid the conveyances; that Rawlins was the real party in interest and not Fleener and Hurley; and that the title was taken and held in the names of the grantees for Rawlins for his own use and benefit, rendering the conveyances entirely void. The decree directed the grantees, within three days, to convey the respective properties back to Rawlins, and upon their failure so to do that the master in chancery execute deeds in their behalf, and that the lien of the judgment owned and secured by plaintiff in the municipal court is a lien on the properties, prior and superior to the conveyances made to the Fleeners and Hurley.

The question presented is whether the findings and conclusions of the decree are sustained by the evidence. In drawing an analogy between this case and Luthy & Co. v. Paradis, defendants' counsel argue that the material facts and issues presented for consideration in that case are so identical with the circumstances of the suit at

bar as to make that decision decisive and controlling. In the Luthy case, complainant brought a creditors' suit alleging recovery of a judgment against Henry C. Paradis, the issuance of an execution, and the return thereof unsatisfied. The bill further alleged that Paradis executed a note July 29, 1914, to secure an indebtedness owing plaintiff, and that at the time he owned certain real estate; that after suit was started on the note, September 20, 1916, Paradis executed a deed to his wife conveying the real estate in controversy. That deed was dated December 13, 1912, and was filed for record September 30, 1916. It was alleged that there was no consideration for the transfer, and that it was made fraudulently and for the purpose of hindering and delaying complainant. The bill prayed that the deed be set aside.

To establish the allegations of its bill the complainant offered the defendants as witnesses and examined them in regard to the transaction. Their testimony discloses that Mrs. Paradis lent her husband money from the time they were married in 1882, until September 23, 1911, when he executed three notes, totaling $4,450, and a mortgage securing them on part of the property involved in that suit. December 13, 1912, he executed a quitclaim deed conveying all the real estate in controversy to her for an express consideration of $4,728, which represented the amount of the notes secured by the mortgage, with interest. At the time the quitclaim deed was executed it was agreed that Mr. Paradis would be allowed to redeem the premises within a year, and that the deed should not be recorded for that length of time.

The first question presented and decided by the court relates to the binding effect of the testimony of the two defendants, who were called as plaintiff's witnesses. Upon this question the court said (pp. 383, 384):

"The appellee claims that it is not bound by the testimony of the appellants though it called them as its witnesses but that the truth may be shown by any competent testimony, even in direct contradiction of what the appellants, as witnesses for the appellee, may have testified to. There is no doubt that this is the law. The trouble about its application to this case is that there is no other competent testimony contradicting the testimony of the appellants. The fact that they may have been impeached by inconsistencies in their testimony or contradictory statements will not supply the lack of proof of the essential elements of the complainant's case. A party who calls his adversary as a witness cannot call in question the latter's credibility. That part of his testimony which makes in favor of the witness must be considered as well as that against him, and if there is no countervailing testimony it must be taken as true. Sawyer v. Moyer, 109 Ill. 461; Bowman v. Ash, 143 id. 649; American Hoist and Derrick Co. v. Hall, 208 id. 597."

It was claimed in the Paradis case that there were certain inconsistencies and contradictions between the testimony of Mr. and Mrs. Paradis and between certain letters written by him, which were introduced in evidence. As to this the court said (pp. 384-85-86):

"*** The appellee claims that these letters and statements are so inconsistent with the testimony of Paradis as to render it unworthy of belief. Assuming that the complainant having offered him as a witness is entitled to impeach his credibility and to show that he is unworthy of belief, the effect of doing so would be only to eliminate his testimony from consideration. *** If it is admitted that her testimony is impeached by its inconsistencies and contradictions, yet these inconsistencies and contradictions had no force to prove the allegations of fraud which were contained in the bill of complaint, and the allegations of the bill are left without any support in the evidence except such inferences as may arise from the withholding of the quitclaim deed from the record until suit was brought by the appellee on its note; the payment of taxes through Henry C. Paradis, which is shown by the tax books, though both husband and wife testified that the taxes were paid by the husband for the wife; the execution of the warranty deed of October 2, 1916, and the execution of the mortgage in 1911. There is nothing in all this evidence to establish the fraud charged in the bill, unless the mere fact of the relation of husband and wife raises a presumption of fraud in transactions between them which casts upon them the burden of proof to overcome it. Where a husband makes a voluntary conveyance to his wife and afterward becomes insolvent, the burden of proof is on him to disprove the implication of fraud as to creditors at the time of making the conveyance. (Dillman v. Nadelhoffer, 162 Ill. 625.) A husband may, however, deal with his wife or relatives in business matters and protect them by conveyances in satisfaction of existing indebtedness if done in good faith. Relationship is merely a circumstance that may excite suspicion, but will not, of itself, amount to proof of fraud or show the absence of a bona fide debt. (Hughes v. Noyes, 171 Ill. 575; American Hoist and Derrick Co. v. Hall, supra; Merchants Nat. Bank v. Lyon, 185 Ill. 343; Ayers Nat. Bank v. Barber, 287 id. 182.) There was no presumption of fraud which required the defendants to introduce proof to overcome it. The mortgage and the deeds purported to be for a valuable consideration. Before the burden to disprove fraud could be cast upon the defendant it was necessary for the

complainant to introduce evidence that there was no valuable consideration. There is no such evidence in the record. While the court will carefully scrutinize transactions between husband and wife, it cannot relieve the complainant of the burden of producing evidence tending to show that the transaction was fraudulent or that the conveyance was void. Bowman v. Ash, supra; Sawyer v. Moyer, supra."

Plaintiff's counsel asserts that the Luthy & Co. v. Paradis case is not in point, since, as he contends, there was no evidence in that case except the testimony of defendants when called by plaintiff as its witnesses, and that the witnesses having given testimony favorable to themselves and there having been no countervailing evidence in that case, the proof was insufficient to support plaintiff's contention. We think that is true of the case at bar. Plaintiff's counsel further argues that the failure of the Fleeners and Hurley to appear and testify on their own account and to produce evidence of their alleged debts tends to support plaintiff's charges. We do not understand this to be the rule of law applicable to cases of this kind. There is nothing in the record to indicate that plaintiff could not have called the Fleeners and Hurley, and, as was said in the Luthy case, both from the evidence of Rawlins and Bahm "there was no presumption of fraud which required the defendants to introduce proof to overcome it. *** Before the burden to disprove fraud could be cast upon defendants it was necessary for the complainant to introduce evidence that there was no valuable consideration." In the case at bar Rawlins testified that there was a valuable consideration, and in the absence of any countervailing proof, even though there were some inconsistencies in his testimony, it was not incumbent upon the defendants to testify.

It is fundamental in our law that the burden of proof is upon the party charging fraud. A creditors' suit which seeks to set aside a conveyance on the ground of fraud is no exception to

this rule. In fact, the proof of fraud charged in proceedings of this kind must be clear and convincing, and conveyances will not be set aside in the absence of such a showing. (Ayers Nat. Bank v. Barber, 287 Ill. 182; Byerly v. Byerly, 363 Ill. 517. In Weininger v. Metropolitan Fire Insurance Company, 359 Ill. 584, the court said (p. 598) that "where a fraud is charged it must affirmatively be proved by clear and convincing testimony," and in Jeffries v. White, 267 Ill. App. 331, which was a creditors' suit, the court said (p. 333) that "in order to maintain a creditor's bill the complainants therein must show a clear right to the relief sought."

In both Luthy & Co. v. Paradis and Ayers National Bank v. Barber, supra, transactions between husband and wife were involved, and it was said that every transaction is presumed to be fair and honest until the contrary is established; that a husband may deal with his wife in business matters and protect her by conveyances in satisfaction of existing indebtedness; that he may also protect relatives standing as creditors, if done in good faith; and that these relationships are not proof of fraud or lack of bona fide intentions. While it is true that conveyances to relatives may excite suspicion, the relationship is merely a circumstance but will not of itself amount to proof of fraud. (American Hoist Co. v. Hall, 208 Ill. 597; Merchants National Bank v. Lyon, 185 Ill. 343.) Rawlins in his testimony was frank to say that he intended to prefer the Fleeners and Hurley because of an indebtedness incurred long prior to that of plaintiff. Under the authorities he was justified in preferring one creditor over others, if he acted without fraud. (Hurt v. Ohlman, 349 Ill. 163.) The master and chancellor evidently proceeded upon the theory that the proof of Rawlins indebtedness to the Fleeners and Hurley was somewhat indefinite as to the amounts. We find, however, that he testified specifically as to the sums which he had

borrowed from them, and, there being no countervailing proof or any material inconsistencies in his evidence, the chancellor was not justified in disregarding his testimony, or if he did disregard it, the effect of so doing was to leave plaintiff without any proof to sustain the allegations of its complaint. The rule that a debtor may prefer one creditor over others, if he acts in good faith, is well stated in Third National Bank v. Morris, 331 Ill. 230, 233, as follows:

"The conveyance was a preference of the $10,000 debt over E. J. Norris' other debts, but a debtor has a right to prefer one creditor, when he acts without fraud, even though he devotes all his property to the preferred creditor, leaving nothing for his other creditors to resort to. There must be evidence to show a fraudulent intent before a conveyance made upon a valuable consideration may be held fraudulent."

After a careful examination of the only evidence adduced by plaintiff, we are convinced that this case is strikingly analogous to Luthy & Co. v. Paradis, supra, in its most important aspects, and that the testimony of Rawlins and Bahm fell far short of sustaining the charges of fraud in the complaint. Under the circumstances, we are of the opinion that the decree of the Superior court was erroneous and it is therefore reversed and the cause remanded with directions that the complaint be dismissed for want of equity.

DECREE REVERSED AND CAUSE REMANDED
WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

39661

PEOPLE OF THE STATE OF ILLINOIS,
Appellant,

v.

JOYCE PANGOS,
Appellee.

APPEAL FROM MUNICIPAL COURT OF CHICAGO.

293 I.A. 636

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant herein, Joyce Pangos, was tried on an information signed by Norma Delsenno, alleging that December 8, 1936, Joyce Pangos had in her possession a certain habit forming drug, to-wit, morphine, not being anapothecary, physician, etc., in violation of the laws of the State of Illinois, and was found guilty and sentenced to the Women's State Reformatory at Dwight, Illinois, for one year. A jury was waived and the cause tried by the court pursuant to a plea of guilty interposed by defendant. It appears from the record that defendant was represented at the hearing by counsel. After defendant had served approximately three and one-half months of her sentence Zita L. Stone filed a petition March 17, 1937, in the municipal court in the nature of a writ of error coram nobis. The salient part of the petition is as follows:

"Your petitioner states in support of the above motion that the Court was not completely advised as to all the circumstances, and that if granted a new trial, petitioner will be able to offer new testimony in favor of said Joyce Pangos; said testimony being proof that said Joyce Pangos did not commit the offence of which she has been found guilty."

Joyce Pangos was not a party to the petition and did not sign it.

The state's attorney on behalf of the People filed a

motion to dismiss the petition on the ground that it did not state facts but mere conclusions; that the alleged facts were known to the defendant at the time of the trial; and that the petition was insufficient to vest the court with jurisdiction. March 17, 1937, the superintendent of the Women's Reformatory at Dwight, Illinois, was ordered to produce defendant before the municipal court on March 26, 1937, and a hearing was then had on the petition and the People's motion to dismiss it. The record does not disclose what disposition was made of the motion to dismiss, but merely recites:

"Now come the People by the State's Attorney, and the defendant, as well in her own proper person as by counsel also comes, and thereupon the defendant moves the court to vacate the judgment of December 9, 1936, and the Court being fully advised in the premises, sustains said motion, except as to time served."

The record further discloses the following order:

"The Court, after hearing all the testimony of the witnesses, and the arguments of counsel, and being fully advised in the premises, renders the following finding, to-wit:

"The court finds the defendant Mrs. Joyce Pangos, not guilty wherefore it is considered by the court that the defendant is not guilty of the offense charged against her in the information herein and it is ordered by the court that said defendant be discharged and go hence without day."

This appeal xxxxx seeks to review the judgment of the municipal court so rendered March 26, 1937, on the common law record, no bill of exceptions having been preserved.

The petition was manifestly insufficient to vest the court with jurisdiction to review the proceedings. The petition, brought under sec. 72, par. 200, chap. 110 (Illinois State Bar Stats., 1935), is based on the abolished ancient common law writ of coram nobis, to relieve against errors of fact committed in entering judgment, such as the death of either party pending suit; infancy, where the party was not properly represented by guardian; coverture, where the common law disability still exists; insanity at the time of the trial, or a valid defense existing in the facts of the case, but which, without

negligence on the part of the defendant, was not presented to the court either through duress, fraud or excusable mistake, these facts not appearing on the face of the record and being such that if known in season would have prevented the rendition and entry of the judgment. It has been consistently held by the courts of this state that the petition must state facts and not mere conclusions in order to vest the court with jurisdiction. (People v. Long, 346 Ill. 646; Jacobson v. Ashkinaze, 337 Ill. 141; Stevenson v. State of Indiana, 205 Ind. 141 (186 N. E. 293). In the latter case the rule was stated as follows (p. 196):

> "The evidence by which the existing fact or facts can be proved must be set out in the petition, and the petition must allege facts showing that by the exercise of diligence the petitioner could not have been able, and was not able, to produce the facts relied upon at the trial or before judgment, by a motion for a new trial or otherwise."

With reference to the particular petition filed in that case the court held that the allegations were not sufficient, and said (pp. 197, 198):

> "The allegations are not sufficient. The facts which would have prevented the rendition of the judgment, had they been known at the trial, must be set out so that they may be scrutinized by the court hearing the petition."

In the instant proceeding the petition does not state or even remotely suggest that the new evidence was unknown to defendant or unavailable to her at the time of the trial. There is nothing in the petition to indicate the nature of the new testimony which would enable the court to scrutinize the petition for the purpose of determining whether it would be likely to affect the court's prior judgment. The petition merely alleges the conclusion that the new testimony would tend to show that Joyce Pangos did not commit the offense of which she had been found guilty, without indicating the nature of the evidence. The petition fails to state or even suggest that the newly discovered evidence was not available to defendant at

the time of the first trial. Therefore, it is fair to presume that defendant knew of the alleged facts at the time of the original hearing and through her own negligence failed to present them. Under the law this does not entitle her to another hearing.

The law is well settled that a petition for a writ of error coram nobis cannot be used by the trial court to review or reverse its own judgment. In Chapman v. North American Ins. Co., 292 Ill. 179, the court said (pp.185, 186):

"It is important in considering this question to keep in mind this proposition; that the trial court cannot review itself or its own judgment and correct the same, either as to any question of fact found or decided by the court or as to any question of law decided by it after the term has ended."

In Hemsius v. Poehlman, 282 Ill. App. 472, the court said (p. 476):

"The purpose of a writ of error coram nobis, or the motion under our statute is not to review the errors of the trial judge, but to grant relief where there is some fact in the record, which, if known to the court at the time, would have prevented entry of the judgment."

It has also been held that the court can pass only upon facts not presented on the original trial, and the issues must be made upon these new facts exclusive of all others. If the petition fails to allege sufficient facts it is the duty of the court to deny the petition, which stands or falls upon the new facts presented. (Gould v. Watson, 80 Ill. App. 242-247.)

Aside from the foregoing reasons why the petition should have been dismissed, it appears that petitioner is a stranger to the original judgment. A similar situation was presented in People v. Nakielny, 279 Ill. App. 387. In that case Michael Nakielny was the defendant and a verified petition was filed by Julia Nakielny. In holding the petition to be defective we said (p. 395):

"Julia Nakielny, who commenced the instant proceedings and who verified the petition, is a stranger to the original

judgment. Within the meaning of the law, she was not injured by that judgment, nor will she derive advantages from its reversal. It (the motion) should ahow some meritorious right to be enforced, of benefit to the mover."

In the Nakielny case the trial court evidently treated the petition as an ordinary motion for a new trial. The same may be said of this proceeding. That the trial court had no jurisdiction to entertain a motion for a new trial is settled law. The petition herein was but a patent subterfuge intended to give the court an appearance of jurisdiction which was clearly lacking. Holding as we do that the motion in the nature of a writ of error coram nobis was fatally defective the motion of the state to dismiss was the proper legal method of questioning the sufficiency of the petition and should have been allowed. Therefore the judgment order of the municipal court of March 26, 1937, is reversed. The state's attorney should immediately take proper steps to bring about the recommitment of the defendant under the judgment order of December 9, 1936.

JUDGMENT ORDER OF MARCH 26TH REVERSED.

Scanlan and Sullivan, JJ., concur.

39777

THE TRUST COMPANY OF CHICAGO, administrator of the estate of RAYMOND BUDRICK, deceased, and EUGENE SHEEHAN, a minor, by his father and next friend, John Sheehan,
Appellants,

v.

CITY OF CHICAGO, a municipal corporation,
Appellee,

APPEAL FROM
SUPERIOR COURT,
COOK COUNTY.

293 I.A. 636

MR. PRESIDING JUSTICE FRIEND
DELIVERED THE OPINION OF THE COURT.

The Trust Company of Chicago, administrator of the estate of Raymond Budrick, deceased, and Eugene Sheehan, a minor, by his father and next friend, John Sheehan, brought suit against the City of Chicago and Helen Jeriche, defendants, for damages arising out of injuries sustained by deceased resulting in his death, and to Sheehan, as the result of the collapse of a frame building owned by defendant Helen Jeriche. At the close of plaintiffs' case the jury was peremptorily instructed to return a verdict finding both defendants not guilty and judgment was entered accordingly. This appeal is prosecuted by each of the plaintiffs to reverse the verdict and judgment in favor of the City of Chicago. No appeal was taken from the judgment in favor of defendant Helen Jeriche because of her apparent insolvency.

The frame two-story and basement building that collapsed was located on the rear of a lot on Normal avenue, the side of the building being adjacent to the east sidewalk along Normal avenue. In front of the building was a vacant lot extending

north about 100 feet to 46th street. The lower apartment of the building had been occupied by a tenant named Galloway and his family for three or four years prior to the accident, which occurred about four o'clock p. m. October 4, 1934. The Galloways had vacated the premises only a few days before the building collapsed. The upper apartment had been vacant for about a year and a half before the accident.

Before the Galloways moved from the premises the windows in their apartment were all intact. By October 4th all the windows in the bedrooms had been broken. On the day in question a number of boys in the neighborhood entered the building through the broken windows, and otherwise, and proceeded to tear boards from the walls and window frames, which were thrown to other boys below who gathered the lumber for the purpose of building a clubhouse. In the course of the afternoon the boys were several times dispersed from the premises. About two o'clock p. m. a police officer chased them away, and a little later the children again dispersed upon the approach of another officer. Tim Cassidy, who resided across the street from the building, testified that he chased the children away once before the police called, and once after. Before the building collapsed some twenty-five or more boys had gathered in and about the building.

Shortly before four o'clock Francis Boyle, one of the boys, was chopping or knocking down the window frame in a north room on the first floor when the building collapsed, falling to the north, injuring plaintiff Eugene Sheehan, twelve years of age, who was with Boyle at the time, and killing Raymond Budrick, a lad of seven, who was standing on the lot underneath the steps which led up from the sidewalk on Normal avenue to the north entrance of the second apartment. The building was old and dilapidated and had not been painted for many years. Some of the shingles appeared loose and a few boards had been removed from parts of the exterior of the building. Cassidy

testified that rats had burrowed into the basement from the alley on the south side, and that the building had sunk so that it leaned to the south.

Plaintiffs proceeded upon the theory that the evidence disclosed this structure to be in an obviously dangerous condition, adjacent to and in close proximity to a public sidewalk; that this condition was well known to the City of Chicago, its agents and servants, and that in the exercise of its legal duty to keep the sidewalks and streets of the city in a reasonably safe condition for the use of pedestrians lawfully using them, the city was negligent in failing to place any safeguard about the street or the portion thereof adjacent to this building, where any pedestrian could observe the likelihood of the building falling over and upon the city sidewalk. Plaintiffs' counsel rely upon a number of decisions in Illinois and other states to support their contention that the evidence adduced tended to sustain a cause of action against the city. Geary v. City of Chicago et al., 161 Ill. App. 461, is cited. That case involved a stairway leading up from a basement onto the sidewalk. The stairway was partially guarded by a railing and the plaintiff was injured by falling into the stairway from an unguarded portion in the walk. The court held that it was the city's duty to use ordinary care to see that its streets, including its sideways and parkways, were safe for those lawfully using them for their intended purposes. The defect in that case was present on the city's property, and the court held that the city owed a ministerial duty to correct it, the failure of which rendered the city liable. In the case at bar a stairway also projected onto the sidewalk, but it cannot be contended that the stairway in any way brought about the injury to plaintiffs, both of whom were on private property when the building collapsed.

In Turner v. City of Wichita, 57 Pac. (2d) 79, 143 Kan. 808,

another case cited by plaintiffs, a child was killed by a branch falling from a tree growing in the parkway. When injured the child was on the sidewalk where the city owed him the duty to exercise ordinary care and therefore that case is not applicable to the circumstances of this proceeding. Other cases cited involved injuries resulting from excavations adjacent to the street or sidewalk, which rendered the city liable by reason of notice and its consequent failure to barricade the street or sidewalk over which pedestrians passed. All the cases cited and relied upon by plaintiffs can be differentiated from the case at bar by reason of special circumstances showing that the parties injured were either pedestrians on city sidewalks, where the respective municipalities owed them the duty to exercise ordinary care for their safety, or where the city was required to guard against excavations or improvements being made adjacent to the street, which required the city to keep the street or sidewalk safe for those using it for its intended purposes.

As to the plaintiff Sheehan the evidence is clear that he was a trespasser in the building, was present on private property and that the city owed him no duty whatsoever. As to the minor Budrick, the evidence of plaintiffs' witnesses is conclusive that he was at the time on private property, underneath the stairs on the lot on which the building in question was constructed. His own brother testified that he had warned him against going there, and another witness placed him under the stairway on private property when the building collapsed.

From a careful reading of the evidence, it appears certain that the collapse of the building was not due to its previous state of disrepair, but was caused solely by the demolition within the building on the afternoon of October 4, 1934. According to plaintiffs' own evidence the building listed to the south before the collapse; nevertheless, when it did collapse, it fell to the

north, and the testimony of plaintiffs' witnesses indicates that this was caused by the removal of boards and supports within the building, which so weakened the structure as to cause it to fall toward the north. Although there is some evidence that the city had notice of the dilapidated condition of the building, there is no evidence whatsoever that it had either actual or constructive notice of the demolition of the interior of the structure on October 4th.

The law is well settled that since these two boys were injured while on private property, by a privately owned nuisance, the city owed them no duty and cannot be held liable for their injuries. In Head v. City Council of Augusta, 169 S. E. (Ga. App.) 48, the court, in sustaining a demurrer to the complaint, held that where the wall of a building is left standing after a fire on private premises, near a street and sidewalk, and is in a dangerous condition, a municipal corporation is not liable for an injury caused by the collapse of the wall to a person not on the street or sidewalk at the time.

In Kiley v. The City of Kansas, 87 Mo. 103, cited in Head v. City Council of Augusta, supra, plaintiff recovered judgment in a suit for damages for the death of a child, occasioned by the falling of a brick wall of a building which had been burned. The wall stood on private property on the line of the street for two or three months after the fire. The evidence disclosed that it was unstable and dangerous to persons passing on the sidewalk, as well as to the occupants of a small house which was situated about ten feet to the north and also on a line with the sidewalk. At the time of the accident the child was visiting the occupant of this house. The wall fell into the street and upon the house, crushing it. The child's body was found near to or on the sidewalk.

In reversing the judgment of the lower court, entered in favor of plaintiff, the Supreme court of Missouri propounded the following inquiry (p. 107): "As to persons not using the street, was the city bound to abate the nuisance, and is it liable for failure so to do?", and after reviewing the decisions cited in that case answered the inquiry by saying (p. 109): "A municipal corporation is not liable in damages for a failure to abate a nuisance existing upon private property, and not created by its agents, though it has the power so to do. Davis v. City of Montgomery, 51 Ala. 139; Levy v. City of New York, 1 Sandf. (N.Y.) 465; Hewison v. City of New Haven, 37 Conn. 475; Armstrong v. City of Brunswick, 79 Mo. 319."

The evidence in this case discloses that the trespassers were entering the building through windows as well as doors. At the time of the accident numerous boys were loitering on the lot to the north of the building. It is obvious, therefore, that barricading the sidewalk and street adjacent to the house, as plaintiffs contend the city should have done, would have been ineffectual, since access to the house from the north and east would not thereby have been barred, and to have barricaded the entire building would have invaded the property rights of the owner and required the exercise of governmental powers, which the city was not required to do.

The cases cited in the city's brief lay down the rule that no recovery can be had in any event where the negligence of the municipal corporation consists in failing to perform legislative or judicial duty, nor in simply performing such a duty in an improper method. The municipality becomes liable only where it negligently performs or negligently fails to perform a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. (Wheeler v. City, 18 N. E. 532; Dooley v. Town of Sullivan, 112 Ind. 451; McDade v. Chester City, 117 Pa. St. 414; McArthur v.

Saginaw, 58 Mich. 357; Kiley v. The City of Kansas, 87 Mo. 103.)

The three counts of plaintiffs' complaint proceed upon the theory of an attractive nuisance, but obviously no recovery can be had upon this theory, since, as heretofore said, the evidence clearly discloses that the injuries were caused, not by the dilapidated condition of the building, which is alleged to have constituted the nuisance, but through the demolition of the structure by children who were then trespassers on private property.

Plaintiffs failed to establish a cause of action, and since there was no evidence at the close of plaintiffs' case upon which the city could be held liable for the injuries and death sustained, we are of the opinion that the court properly directed the jury to peremptorily find for defendant.

The judgment of the Superior court is affirmed.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.

39401

LILLIAN M. ANDERSON, ETHEL GRIMSELL, and EDWIN L. GIDLEY, as Substituted Administrator Cum Testamento Annexo of the Estate of MABEL ADELAIDE DUNNE, Deceased, (Plaintiffs)
Appellants,

v.

WILLIAM OSCAR OLSEN, Individually and as Trustee under a certain trust, et al., Defendants.

MABEL A. OLSEN and HORTENSE M. OLSEN, (Defendants)
Appellees.

APPEAL FROM SUPERIOR COURT, COOK COUNTY.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT:

Plaintiffs, Lillian M. Anderson, Ethel Grimsell, and Edwin L. Gidley, as substituted administrator cum testamento annexo of the estate of Mabel Adelaide Dunne, deceased, filed their verified second amended complaint against William Oscar Olsen (also referred to as William O. Olsen and W. O. Olsen) individually and as trustee, Mabel A. Olsen, Hortense M. Olsen, Alice Beutlich, Floyd Olsen and Ethel Olsen Foster. The three last named defendants were personally served with summonses but failed to answer the complaint. William Oscar Olsen answered. Mabel A. Olsen and Hortense M. Olsen filed a written motion to dismiss the suit as to them. Upon the hearing of this motion the court entered an order dismissing the cause as to them, and ordering, adjudging and decreeing that said defendants do not hold the title to the real estate in question (describing it) "in trust for said William O. Olsen and that said William O. Olsen does not hold said real estate in trust for the plaintiffs herein or any of them, and that said Mabel A. Olsen and said Hortense M.

Olsen do not hold the title to said real estate in trust for the plaintiffs herein or any of them." Plaintiffs appeal from the order. Mabel A. Olsen and Hortense M. Olsen, appellees, state they do not desire to question the finality of the order.

The contention of plaintiffs that it was improper for the trial court to incorporate, in its decree, findings of fact, is ~~obviously~~ a meritorious one. (See Rosenzweig v. Reitman, 266 Ill. App. 124, 129 (decided by this branch of the court), and cases cited therein.) Upon what theory the trial court made these findings does not appear from the record.

Plaintiffs' contention that their second amended complaint states a cause of action for relief against defendants Mabel A. Olsen and Hortense M. Olsen and that the trial court erred in dismissing the complaint as to them, is clearly a meritorious one.

Plaintiffs' second amended complaint (hereinafter referred to as the complaint) alleges, in substance, that Hannah C. Olsen died December 13, 1923, leaving a last will and testament dated November 14, 1923, which was admitted to probate in the Probate court of Cook county on March 26, 1924. By the provisions of the will, set forth in full in the complaint, Christian Olsen, surviving husband of the testatrix, was given a life estate in one-third of all the real estate of which the testatrix died seized, in lieu of dower. All the rest, residue and remainder of the estate was disposed of as follows: one-sixth thereof to her daughter "Mabel Dunn" (now deceased, whose estate is represented here by plaintiff Edwin L. Gidley, as substituted administrator, etc., of the estate of Mabel Adelaide Dunne); one-sixth to her daughter "Lillie M. Anderson" (plaintiff Lillian M. Anderson); one-sixth to her daughter Ethel Grimsell, plaintiff; one-sixth to her son William Oscar Olsen; one-sixth to her daughter Alice Beutlich; and

the remaining one-sixth to said Alice Beutlich and William Oscar Olsen, in trust for the use and benefit of Floyd Olsen and Ethel Olsen (now Ethel Olsen Foster), grandchildren of the testatrix. Alice Beutlich and William Oscar Olsen were appointed executrix and executor, respectively, of the will. The complaint further alleges that on March 26, 1924, Alice Beutlich filed, in the estate, an instrument in writing renouncing and releasing all rights and interest given her by the will; that she and William O. Olsen qualified as executrix and executor, respectively, of the will, and filed, in the Probate court of Cook county, an inventory of the assets of the estate, which consisted of $490 in money and an apartment building in Chicago; that the estate was closed on June 4, 1925; that on December 20, 1924, said real estate was conveyed, by warranty deed, to defendants Mabel A. Olsen and Hortense M. Olsen, in joint tenancy; that said deed was recorded in the Recorder's office of Cook county; that the purchaser of the real estate was William O. Olsen, and that title was taken by him in the names of his spinster daughters, Mabel A. Olsen and Hortense M. Olsen, because he was then one of the executors of the estate of Hannah C. Olsen; that the purchase price of the real estate was $44,000; that the terms were cash and Olsen acknowledged that he had the full sum of $44,000 on hand and in his possession for the purpose of clearing the title and making distribution of the balance thereof, as follows: two thirds to the parties entitled to share therein, which included plaintiffs; and one-third thereof William O. Olsen was to hold as trustee for the purposes of a certain trust agreement for the benefit of Christian Olsen; that by the will Christian Olsen was given a life estate in one-third of the real estate in lieu of dower; that Christian Olsen accepted the terms and provisions of the will and made no renunication thereof;

that by the will Lillian M. Anderson, Ethel Grimsell and Mabel A. Dunne (the latter represented herein by plaintiff Edwin L. Gidley, as substituted administrator, etc., of her estate) were each given an undivided one-sixth part of the real estate sold, subject to the life estate of Christian Olsen; that at or about the time of the sale of the real estate it was orally agreed by and between Lillian M. Anderson, Ethel Grimsell, Mabel A. Dunne, Alice Beutlich, Christian Olsen and William O. Olsen, all individually, and Alice Beutlich and William O. Olsen, as trustees under the will of Hannah C. Olsen, that William O. Olsen was to retain and hold a one-third part of the net proceeds of the sale, plus five-ninths of the net rents or income from said real estate collected by him from the date of the death of the testatrix to the date of the sale (the remaining one-ninth of said net rents being the share of said rents to which the trustees of Floyd Olsen and Ethel Olsen Foster were entitled), in trust, as trustee for the following uses and purposes: "To hold and invest said trust funds and to pay the net income therefrom to the said Christian Olsen during the remainder of his natural life, and upon the death of the said Christian Olsen, the said trust estate to terminate and the said William O. Olsen, as Trustee, was then to distribute the corpus of said trust estate as follows: The said five-ninths of the said rents paid into said trust fund to be distributed in equal parts to Lillian M. Anderson, Ethel Grimsell, Mabel A. Dunne, Alice Beutlich and William O. Olsen; and the said one-third of the net proceeds of the said sale paid into said trust fund to be distributed in equal parts to each of the following: Lillian M. Anderson, Ethel Grimsell, Mabel A. Dunne, Alice Beutlich, William O. Olsen, all individually, and Alice Beutlich and William O. Olsen, as joint Trustees of the estate given in trust to Floyd Olsen and Ethel Olsen under the last

will and testament of Hannah C. Olsen, deceased;" that by oral agreement of all said parties it was agreed that Alice Beutlich was to receive a share of said trust estate even though she had waived and renounced her rights under the will; that thereupon William O. Olsen entered into and upon his duties as trustee under said trust agreement; that Lillian M. Anderson and Ethel Grimsell were informed by William O. Olsen that the net proceeds of said sale amounted to $31,697.40 but that neither of them has ever been informed by him as to the amounts of rents, issues and profits derived from said sale and collected by him from the date of the death of the testatrix to the date of the consummation of the sale of the real estate to him; that plaintiffs neither admit nor deny the "accuracy of the net proceeds of said sale being $31,697.40," as neither of them has been shown any receipts for the alleged disbursements made and deducted from the purchase price of $44,000; that under the will Christian Olsen was entitled to one-third of the net income from the real estate, and the other two-thirds of said net income was to be distributed in six equal parts among the other beneficiaries, including plaintiffs; that upon the sale of the real estate in accordance with the trust agreement, quoted above, William O. Olsen entered upon the duties of his trust; that the corpus of said trust was to consist of one-third of the net proceeds of the sale of the real estate plus five-ninths of the net rents or income derived from the real estate from the date of death of the testatrix to the date of the consummation of the sale, the total income from which trust fund William O. Olsen, as trustee, was to pay to Christian Olsen for the remainder of his natural life; that Christian Olsen died, intestate, on February 6, 1930; that although the trust estate was to terminate upon the latter's death and William O. Olsen, as trustee, was to render an accounting of his acts and doings as trustee

and make distribution of the corpus of said trust in accordance with the trust agreement, he has not made or rendered an accounting to plaintiffs Lillian M. Anderson and Ethel Grimsell, or either of them, nor has he paid or caused to be paid to them or either of them or to the estate of Mabel Adelaide Dunne any part of said trust estate; that prior to the filing of this cause plaintiffs Lillian M. Anderson and Ethel Grimsell, on various occasions personally demanded of William O. Olsen that he make and render to each of them an accounting of the rents collected and of his trusteeship, and to make distribution of the corpus of said trust estate in accordance with the trust agreement, but that no such accounting or distribution has been made by William O. Olsen to said plaintiffs or either of them, although he often promised to take care of these matters "when he found time to do so;" that Mabel Adelaide Dunne died, testate, on or about February 27, 1932, and her husband, Thomas Dunne, was appointed and qualified as executor of her estate; that in April or May, 1932, Thomas Dunne, as executor, demanded an accounting and settlement of the estate of Hannah C. Olsen, deceased, and of the trust estate, aforesaid, from William O. Olsen, and after many subsequent demands for an accounting and settlement Olsen rendered a statement, on or about August 12, 1932, to Thomas Dunne, to which statement Thomas Dunne made objections and so advised William O. Olsen of his objections to said statement and demanded of him an explanation of various parts thereof, and additional information, which information and explanation William O. Olsen failed to give; that Thomas Dunne died about November 11, 1932; that about January 26, 1933, letters of substitutionary administration with the will annexed of the estate of Mabel Adelaide Dunne were issued to Edwin L. Gidley, one of the plaintiffs herein; that it is alleged by Gidley that the statement rendered by William O. Olsen to Thomas

Dunne and objected to and rejected by Thomas Dunne, is incomplete, evasive and not understandable in many respects, and does not set forth an itemized account of the rents collected or an itemized account of the expenditures claimed by William O. Olsen in arriving at the net proceeds of the sale of the real estate and in arriving at the net rental or income derived therefrom before the sale; that said statement does not show in what manner the trust estate created for Christian Olsen was invested, nor give an itemized account of the income derived from said trust estate; that the statement shows that William O. Olsen paid almost all of the corpus of the trust estate to Christian Olsen, which payments, if made, were contrary to and in violation of the terms and provisions of the trust agreement creating the trust estate, and constitute a breach of the terms and provisions of the trust agreement and a fraud upon plaintiffs; that said statement shows an alleged overpayment to Floyd Olsen, which William O. Olsen charges against plaintiffs; that said overpayment was unauthorized by plaintiffs and that no part thereof was received by them; that said statement shows alleged unauthorized payments and disbursements, stating total sums with no further explanatory matter to indicate what these "expenses" and "general expenditures" were or covered; that Thomas Dunne, as executor, made objections to such items and requested an itemized statement, but this request was not complied with by William O. Olsen; that if the payments aforesaid were made they constitute fraud, resulting in unfair profit and undue advantage to William O. Olsen; that said statement was never accepted by Thomas Dunne, as executor, nor by plaintiff Gidley, and that said statement is not set forth in or attached to the complaint as William O. Olsen has or should have the original or a copy of said statement in his possession; that plaintiffs Lillian M. Anderson and Ethel Grimsell have never received a copy of the said statement from William O. Olsen or from his attorneys or agents; that because

plaintiffs Lillian M. Anderson and Ethel Grimsell, and Mabel A. Dunne were inexperienced in the usual matters of business and that William O. Olsen, their brother, was actively engaged in business and commercial enterprises, and was one of the executors named in the will of Hannah C. Olsen, their mother, they were guided by and dependent upon the advice of William O. Olsen in the handling and business of the property devised to them by their mother, and plaintiffs Lillian M. Anderson and Ethel Grimsell agreed to the request of William O. Olsen that he handle the details of the sale of the real estate to himself and that he administer the said trust estate; that in reposing this confidence in him they fully expected that the said trust estate would be honestly, properly and prudently managed according to the express agreement of all the parties in interest, that after the death of Christian Olsen a prompt accounting would be made to them by William O. Olsen and that distribution of said trust estate would be made to them in accordance with the trust agreement; that William O. Olsen was then the only living brother of plaintiffs Lillian M. Anderson, Ethel Grimsell, and Mabel A. Dunne during her lifetime; that they all placed implicit confidence in him, fully expecting and believing that he would properly and honestly perform his fiduciary relation toward them, render a true and just accounting and make proper distribution of the trust estate, but that they now realize and state that he does not intend to do so unless compelled so to do by order and decree of the court; that the cash, assets, books of account, records, receipts, entries and statements concerning or relating to the administration of the estate of Hannah C. Olsen, the sale of the real estate, the rentals and income from the real estate so collected by William O. Olsen, and the trust estate hereinbefore referred to, including disbursements made, if any, from said trust estate, disbursements made out of the proceeds of the

sale of the real estate and the income collected therefrom, if any, were from the death of Hannah C. Olsen, and are still, held and kept exclusively by William O. Olsen; that although he was to retain one-third of the net proceeds of the sale of the real estate and five-ninths of the net rentals or income derived therefrom and collected by him from the date of death of Hannah C. Olsen up to the delivery of the deed, as aforesaid, and hold the same in trust for the purposes described in the trust agreement, and although he claimed and acknowledged to the beneficiaries named in said trust agreement that he had and was holding said sums as trustee in accordance with the terms of said trust agreement, plaintiffs have never seen the money constituting said trust fund, nor have they seen or been advised of the manner in which said trust fund was invested, if invested, in order to create or produce an income therefrom for the benefit of Christian Olsen, nor did William O. Olsen ever exhibit any books or records to plaintiffs showing the deposit of said moneys in any bank or invested in securities or otherwise, and that plaintiffs believe, and upon such belief charge the fact to be, that William O. Olsen never paid to himself, as trustee, one-third of the net proceeds of the sale of said real estate nor five-ninths of the net rentals or income derived from the real estate, so as to constitute the trust estate, as he had stated and acknowledged to Lillian M. Anderson and Ethel Grimsell, plaintiffs, Alice Beutlich, Mabel Adelaide Dunne and Christian Olsen that he had so paid to himself and was in the possession of said trust estate, and led them to so believe at the time said trust agreement was entered into, and that by falsely claiming that he was in possession of the trust estate, if he was not in such possession, he thereby deliberately practiced fraud upon plaintiffs Lillian M. Anderson and Ethel Grimsell, and the other beneficiaries named in the trust agreement, and that he thereby gained unfair profit and undue advantage to

himself in the purchase of the real estate in utter disregard of the fiduciary relation existing between him and plaintiffs Lillian M. Anderson and Ethel Grimsell, and the other parties interested in said real estate and said trust agreement; that plaintiffs further believe and upon such belief charge the fact to be, that whatever moneys were paid by William O. Olsen to Christian Olsen during his lifetime were paid out of the income from said real estate after the purchase thereof by William O. Olsen; that because of such believed facts plaintiffs charge that said real estate is, or should be, impressed with a trust in favor of these plaintiffs to the extent of the correct amount that William O. Olsen should have truly paid into said trust estate under said trust agreement, and that said real estate should be impressed more particularly with a trust in favor of and for the amounts found to be due to plaintiffs; that the title to the real estate is in the names of defendants Mabel A. Olsen and Hortense M. Olsen, in whose names William O. Olsen took title at the time the purchase of the real estate by him was consummated and that there has been no conveyance of said real estate since said deed was given and recorded except by way of a trust deed to secure a certain purported indebtedness; that although title of record is shown in said Mabel A. Olsen and Hortense M. Olsen they merely hold said title for said William O. Olsen; that plaintiff Edwin L. Gidley, brings into court letters of substitutionary administration, etc., in the matter of the estate of Mabel Adelaide Dunne, deceased, as evidence of authority to proceed in this cause. The complaint prays for an accounting by William O. Olsen, individually and as trustee, and that he be required to pay to plaintiffs the amounts shown to be due; and that a constructive trust be declared for the benefit of plaintiffs in the real estate deeded as aforesaid, and for such other and further relief in the premises as equity may require, etc.

The following are the grounds set up in the motion to dismiss: "1. The complaint failed to state a cause of action and does not contain any allegations which could form the basis of any relief against these defendants. 2. It appears upon the face of the complaint heretofore filed herein that this court has no jurisdiction of the subject matter of this suit against these defendants. 3. It does not appear from the complaint that these plaintiffs, or any of them, had a judgment unsatisfied wholly or in part against any of the defendants herein prior to the institution of this suit or that the plaintiffs, or any of them, have exhausted their remedies against any of the defendants herein. 4. It does not appear from the complaint that at the time when the plaintiffs aver that the defendant, W. O. Olsen, transferred the property in question to these defendants in trust, said W. O. Olsen, was indebted to the plaintiffs, or any of them. Wherefore, these defendants pray that the plaintiffs' complaint be hence dismissed and that these defendants have judgment with their costs most wrongfully sustained."

Section 45 of the new Practice act (par. 169, ch. 110, Ill. Rev. Stat. 1937) provides: "(1) All objections to pleadings heretofore raised by demurrer shall be raised by motion. Such motion shall point out specifically the defects complained of ***. (2) Where a pleading or a division thereof is objected to by a motion to dismiss or for judgment or to strike out the pleading, because it is substantially insufficient in law, the motion must specify wherein such pleading or division thereof is insufficient." The motion to dismiss contains three specific grounds, numbered 2, 3 and 4. Appellees state in their brief that they abandon ground 2. As to grounds 3 and 4, appellees state: "Counsel's second amended complaint is so inconsistent and contradictory and so awkardly compiled that it was difficult to determine whether he was seeking relief ordinarily prayed in a

creditor's bill. Since this purpose has been expressly denied by counsel we will not burden the court with any further discussion." This statement amounts to an abandonment of grounds 3 and 4. Section 42 of the new Practice act (par. 166, ch. 110, Ill. Rev. Stat. 1937) provides: "(3) All defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived." Notwithstanding this provision counsel for appellees seek to raise, in this court, new grounds in support of their motion to dismiss. Appellees now urge the following new grounds, clearly afterthoughts: (1) The complaint is fatally defective in that it appears on its face that plaintiffs have been guilty of laches. (2) The complaint does not contain sufficient allegations from which the court could reasonably infer that the deed was not the voluntary act of the grantors, given with full knowledge of its nature and effect, and in accordance with the expressed desire and purpose of the grantors. (3) The complaint utterly fails to contain any allegation of a lack of intention by said William O. Olsen to set up the trust fund. (4) The complaint is fatally defective in that it does not show that plaintiffs relied on the alleged fraudulent misrepresentation or that William O. Olsen intended that they should. (5) The complaint fails to show that the alleged fraudulent misrepresentation made by Olsen was as to a material fact, and it is fatally defective in that the form of the allegation of fraud is insufficient. (6) The complaint is fatally defective "in that the charge of fraud is contradicted by other allegations in the complaint." (7) The complaint is fatally defective in that plaintiffs do not offer therein to return the portion of the purchase price received.

The purpose of section 45 is plain, and it would be highly unjust to permit appellees to now raise new grounds, for had they raised them in the trial court plaintiffs, if they deemed any of the grounds good, might have cured the alleged defects by apt amendments.

We are satisfied, however, that there is no substantial merit in any of the new points. In passing upon pleadings, the following rules laid down in the new Practice act must be observed: "This Act shall be liberally construed, to the end that controversies may be speedily and finally determined according to the substantive rights of the parties * * * [sec. 4, par. 128, ch. 110, Ill. Rev. Stat. 1937]." "(3) [sec. 33, par. 157] Pleadings shall be liberally construed with a view to doing substantial justice between the parties." As stated in Engel v. City of Chicago, 290 Ill. App. 604 (abstract opinion), under the civil practice act no pleading is to be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which he is called upon to meet, and all defects in the pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived.

If plaintiffs can prove the material allegations of their complaint, they have a right of action not only against William Oscar Olsen but against Mabel A. Olsen and Hortense M. Olsen, his daughters. To quote from plaintiffs' reply brief: "To require plaintiffs to proceed to trial without Mabel A. Olsen and Hortense M. Olsen, appellees, being parties to the case would be most unjust to plaintiffs. To obtain an accounting and a decree against W. O. Olsen will most likely avail plaintiffs of nothing. The record title to the real estate in question is not in his name but in the names of appellees, his daughters, which they hold for him. And unless the appellees are retained in this suit plaintiffs might later be forced to file another suit against them or try this case all over again in order to reach the real estate. Equity does not do things by piecemeal but will settle all rights and interests of the parties in the subject matter in one and the same suit. And in the present suit this is the only way plaintiffs can obtain full relief and

justice. There is a substantial amount involved in plaintiffs' suit, namely, about $11,000 (not including the rents) if we take the figures of W. O. Olsen."

The abandonment by appellees of the grounds set up in the motion to dismiss and the improper incorporation in the judgment order of findings of fact show that the order was improvidently entered.

The judgment order of the Superior court of Cook county is reversed, and the cause is remanded with directions to the trial court to overrule the motion of defendants Mabel A. Olsen and Hortense M. Olsen to dismiss plaintiffs' suit as to them, and order them to answer plaintiffs' second amended complaint.

JUDGMENT ORDER REVERSED, AND
CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

39513

IGNATIUS CHAP and WEST THIRTY-FIRST STATE BANK (Complainants),
Appellants,

v.

THE LITHUANIAN NATIONAL CATHOLIC CHURCH OF AMERICA et al.,
Defendants.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

293 I.A. 637

THE LITHUANIAN NATIONAL CATHOLIC CHURCH OF AMERICA,
Appellee.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

The Lithuanian National Catholic Church of America, a defendant, filed four pleas in bar to complainants' amended and supplemental bill and an amendment to it, and, upon complainants' motion, they were set down for hearing. All were sustained and complainants were ruled to reply to them. Complainants filed a replication to the third plea, but refused to reply to the other pleas, upon the ground that they were insufficient, and a decree was entered that the said pleas be taken as confessed and the said bill, as amended, dismissed for want of equity. Complainants appeal.

The amended and supplemental bill, as amended (hereinafter called the bill), alleges, inter alia, that on May 17, 1916, a religious congregation in Chicago was incorporated as a corporation not for profit, as the Lithuanian National Catholic Church of America (hereinafter called Lithuanian Church), under a charter issued by the secretary of state, of Illinois, and recorded in the

recorder's office of Cook county, on June 7, 1916, as Document No. 5883556; that the charter states that the objects of the corporation were, "to organize churches, adhering to the rites, regulations, usages, canons, discipline and requirements of the Lithuanian National Catholic Church of America, adopted or to be adopted by the governing body of said church; also to establish and maintain theological seminaries, parochial schools and convents, to receive any bequests, gifts, or devises entrusted or given to it for carrying out any and all of the above mentioned purposes;" and that the charter provides that the management of the corporation shall be vested in a board of three trustees, to be elected annually. The bill further alleges that on and prior to April 4, 1921, and until July 1, 1921, the real estate in question was owned by The Evangelical St. Marcus Congregation, a religious corporation, and that on April 4, 1921, at a meeting of the members of Lithuanian Church, duly held pursuant to notice to its members and to said Church, the following resolution was adopted:

"Whereas the Lithuanian National Catholic Church of America, a religious corporation, in order to carry out its aims and purposes, is in need of a church building suitable to its congregation in Chicago, Illinois; and, whereas it has been found by the Right Reverend S. B. Mickevicius, D. D. the Bishop of the Lithuanian National Catholic Church of America, a religious corporation, and a properly constituted committee of the congregation of the Lithuanian National Catholic Church of America, that the property * * * [describing the property in question] is a desirable property and will be the most suitable for the purposes of the said congregation; now, therefore, be it and it is hereby resolved that the Lithuanian National Catholic Church of America, a religious corporation of Illinois, shall purchase the said

property * * * [describing it] from the owners thereof for the stipulated sum of ninety five hundred dollars, or less if the present owners of the property should agree to reduce the selling price; and, be it and it is hereby further resolved that the Right Reverend S. B. Mickevicius, D. D. and the officers and trustees of said Lithuanian National Catholic Church of America, a religious corporation as aforesaid, be and they are hereby specifically authorized, directed and empowered to purchase the said property and to take title thereto in the name of and in behalf of the said Lithuanian National Catholic Church of America as aforesaid, to borrow money thereon and to execute promissory notes and other negotiable instruments, trust deeds or mortgages in whole or partial payment thereof, and to perform such other acts and deeds as may be necessary to consummate the said transaction; and, be it and it is hereby further resolved that the Right Reverend S. B. Mickevicius, D. D., and the officers and trustees of the Lithuanian National Catholic Church of America, a religious corporation as aforesaid, be and they are hereby specifically authorized, directed and empowered to employ and retain an attorney at law for the examination of title and the supervision of the purchase of said property."

The bill further alleges that a copy of said resolution, certified by the secretary of Lithuanian Church, was on July 14, 1921, filed for record in the recorder's office of Cook county; that on July 1, 1921, Lithuanian Church purchased said property of The Evangelical St. Marcus Congregation, and on the same date the latter executed and delivered to Lithuanian Church its warranty deed conveying the premises to the latter for a consideration of $9,500; that the premises were then, and are now, improved with a church building and parish house; that for some time prior to July 1, 1921, said premises were occupied

by Lithuanian Church as tenant of The Evangelical St. Marcus Congregation, and upon the execution and delivery of the warranty deed Lithuanian Church took possession as owner; that on July 1, 1921, Lithuanian Church, for the purpose of raising a part of the purchase price, borrowed $6,000, and to evidence the loan executed its principal note for $6,000, dated July 1, 1921, payable in five years, with interest until maturity at six per cent, payable semi-annually, and its ten interest notes of $180 each, payable one every six months; that to secure the payment of said principal and interest notes, and pursuant to the resolution aforesaid, Lithuanian Church, on July 1, 1921, executed and delivered its trust deed of that date, conveying the said premises to Ignatius Chap, Trustee, which trust deed was filed for record on July 14, 1921; that on July 1, 1921, $6,000, the proceeds of said loan, was delivered to and received by Lithuanian Church and was on the same day paid to The Evangelical St. Marcus Congregation, as and for part of the purchase price of the premises; that upon receiving said money Lithuanian Church duly delivered to the lenders of said money the said principal and interest notes and trust deed conveying to said trustee the premises in question; that on or about the respective dates of maturity Lithuanian Church paid each of said ten interest notes; that on July 1, 1926, by an agreement in writing between the parties, the time of payment of the principal note was extended two years, and Lithuanian Church executed and delivered its four extension interest notes of that date, each for $180, payable one every six months, which notes were thereafter paid by it as they matured; that on July 2, 1928, by an agreement in writing between the parties, the time of payment of the principal note was again extended three years, and Lithuanian Church executed and delivered its six extension interest notes of that date, each for $180, payable one every six months during said period

of extension; that Nos. 1 and 2, only, of said extension interest notes were paid and cancelled. The bill also alleges the filing, on May 27, 1931, of the original bill in the cause, by Ignatius Chap, complainant; the names of the parties defendant thereto; that all defendants, except Lithuanian Church, were served by summonses or by publication, and that all defendants were defaulted, except Ignatius Chap, Trustee, who answered; that a decree of sale was entered, finding the amount due complainant Chap and ordering the sale of the premises, unless the indebtedness was paid; that the debt was not paid, and, on March 4, 1932, the premises were sold by a master in chancery to Ignatius Chap for $8,355, and a certificate of sale issued to him; that Chap assigned the certificate of sale to complainant West Thirty-First State Bank; that the premises were not redeemed and a master's deed issued on the certificate to said Bank, on June 18, 1934; that on December 31, 1935, upon the petition of Lithuanian Church and the answer of complainants thereto, an order was entered vacating the decree as to Lithuanian Church and permitting it to plead, answer or demur to the bill; that by virtue of the facts alleged complainant Bank became and is the equitable owner of the principal note, the unpaid extension interest notes and the indebtedness secured by the trust deed, and that the bill is brought to foreclose the trust deed.

Defendant's first plea is, in substance, as follows: Defendant, on January 7, 1916, was organized, under the laws of Illinois, as a religious corporation, for the sole purpose of religious worship, and that on said date "a charter and certificate of incorporation of this co-defendant was duly filed for record in the office of the Recorder of Deeds of Cook County, Illinois, as Document No. 5883556; that it was provided in the above certificate of incorporation of this co-defendant as follows: 'The management of the aforesaid corporation shall be

vested in a board of three trustees who are to be elected annually;' that it is provided by the Illinois statutes that the trustees of religious corporations cannot mortgage its real estate unless direct to do so by the members of the congregation; that the members of defendant's congregation never directed, authorized nor empowered its trustees, at any time, to execute the purported trust deed described in said bill; that its members did not, on April 4, 1921, nor at any other time, adopt the resolution set forth in said bill; that its members did not at any time adopt a resolution directing or authorizing its trustees to execute said purported trust deed. The second plea avers that the trust deed sought to be foreclosed is alleged to have been executed by defendant, a religious corporation, by the Right Reversend S. B. Mickeviez, D. D., Bishop, and Juozas Jucius, Augustas Daugela and Kazimeras Savickas, trustees of said religious corporation, on July 1, 1921; that said alleged trustees were not on said date, nor at any other time, the legally constituted trustees of Lithuanian Church and did not, on said date, have the power or authority to execute the purported trust deed, principal note, etc., sought to be foreclosed; and that said purported note and trust deed were not executed by defendant by its duly constituted trustees, nor by any authorized agent of defendant. The fourth plea avers that the alleged cause of action accrued more than five years prior to January 1, 1931; that defendant did not receive any money or anything of value on account of the alleged execution of said purported promissory note and purported trust deed, at any time within five years prior to that date; that defendant did not at any time within five years prior to that date have or receive any money or thing of value from complainants or either of them, or from any assignor or assignors of complainants; that defendant did not promise to pay to complainants,

or either of them, or any assignor or predecessor in interest of complainants, or either of them, the alleged indebtedness or any part thereof within five years prior to that date; that defendant denies that on July 1, 1926, July 2, 1928, or at any time, defendant entered into a written agreement to extend the time of payment of the alleged principal note, and defendant denies that it paid to any person any of said interest notes, as alleged in said bill.

Complainants contend that the court erred in sustaining the first, second and fourth pleas in bar, in ruling complainants to reply to said pleas, in dismissing the bill for want of equity, and in entering the decree.

As to the first plea in bar: Complainants' position is that the first, second and fourth pleas were all insufficient and that to preserve their rights it was necessary for them to refuse to reply to them. A party, by replying to a plea in equity, waives his objection to its sufficiency and admits the plea to be good, but denies its truth. (See Perry v. U. S. School Furniture Co., 232 Ill. 101, 109.) A plea in equity should clearly and distinctly aver all the facts necessary to render it a complete equitable defense to the case made by the bill, so far as the plea extends. The defendant contends that each of the three pleas sustained presents a full and complete defense to the case made out by the bill, and that the trial court ruled correctly in so holding.

"The true office of a plea is to save to the parties the expense of an examination of the witnesses at large; and the defense proper for a plea is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar or other obstruction to the suit, or to the point to which the plea applies. Therefore a plea, to be good, whether it be affirmative or negative, must be either an allegation or a denial of some leading fact, or of matters

which, taken collectively, make out some general fact, which is a complete defense." (1 Puterbaugh Ch. Pl. & Pr. (7th ed.) p. 197. See cases cited by the author in support of the text.)

"The rule applicable to pleas in equity is, that the same strictness and exactness are required in them that are required in pleas at law, - if not in matters of form, at least in matters of substance. (Story's Eq. Pl. sec. 658.) * * * Where its allegations, being taken as true, do not, so far as it purports to go, make out a full and complete defense, or where the necessary facts are to be gathered by inference, alone, it will not be sustained. (Ibid. sec. 652; 2 Daniell's Ch. Pr. 103; Puterbaugh's Pl. and Pr. Ch. 137.) It must be specific and distinct, and must be perfect in itself, so that, if true, it will make an end of the case, or of that part of the case to which it applies. Allen v. Randolph, 4 Johns. Ch. 693." (Cheney v. Patton, 134 Ill. 422, 434-435.)

"Upon the argument of a plea, every fact stated in the bill, and not denied by the averments in the plea and by the answer in support of the plea, must be taken as true." (1 Barbour's Ch. Pr. 120. See, also, 1 Daniell's Ch. Pl. & Pr. (6th ed.) 692; Mitford's & Tyler's Pl. & Pr. in Eq., p. 388; 10 R. C. L. 462, sec. 230; Story's Eq. Pl., sec. 694; Graves v. Blondell, 70 Me. 190, 192; Gage v. Smith, 142 Ill. 191, 195, 196.)

"* * * The plea, although purporting, on its face, to be an answer to the whole bill, extends only to a part of it. * * * Where a plea in chancery undertakes to answer the whole bill, but extends only to a part of the bill, it is bad. Story, in his Equity Pleadings, (sec. 693,) says: "A plea, like a demurrer, may be either to the whole bill, or to a part, only, of the bill. If it does not go to the whole bill, it should definitely and exactly express to what part it extends. * * * If a plea is to the whole of the bill, but does not extend to

or cover the whole, the plea is bad.'" (Snow v. Counselman, 136 Ill. 191, 197.)

"* * * The presumption * * * must be indulged that appellant has stated his case in his plea as strongly and as favorably for himself as the facts will justify." (Gage v. Smith, supra, 142 Ill. 191, 196.)

The bill alleges that on May 17, 1916, defendant was incorporated as a corporation not for profit by a charter issued by the secretary of state of Illinois, which was filed for record in the recorder's office of Cook county on June 7, 1961; that the objects of defendant, as stated in its charter, were "to organize churches * * * also to establish theological seminaries, parochial schools and convents." These allegations are not specifically denied by the plea. It must be taken as true, therefore, that the objects and purposes of defendant corporation were much broader than those of a congregation for religious worship such as is contemplated by the statute in reference to religious corporations. Religious corporations are not granted charters, but are formed by the filing of an affidavit in the recorder's office. (See Ill. State Bar Stats. 1935, ch. 32, secs. 165, 166.) The allegation of the plea that defendant is a corporation "organized for the sole purpose of religious worship," is a mere legal conclusion and is inconsistent with and contradictory to the admitted fact that defendant was organized as a corporation not for profit. However, corporations not for pecuniary profit and religious corporations are both empowered (Ill. State Bar Stats. 1935, ch. 32, secs. 161, 172) to purchase and hold real estate, to borrow money, and mortgage their property as security, and, therefore, in the determination of the question as to the sufficiency of the first plea it is immaterial whether defendant was a corporation not for profit or a religious corporation. The defendant, by failure to deny the following

facts alleged in the bill, admits them: That defendant purchased the property described in the trust deed for $9,500; that for the purpose of raising $6,000 of the purchase price, it executed the principal note for $6,000 and ten semi-annual interest notes, and the trust deed securing the same; that $6,000, the proceeds of the loan, were received by it and paid over to the vendor as partial payment of the purchase price; that upon said payment the vendor executed a deed to defendant and the latter entered into possession of the premises as owner; that defendant, as each interest note became due, paid the same; that upon the maturity of the principal note in 1926 it entered into an agreement extending the loan two years and executed its four semi-annual interest notes; that it paid said interest notes as they matured, and in 1928 entered into a further agreement extending the loan three years, executed its six semi-annual extension interest notes, and thereafter paid two of the same. The plea does not allege that the execution of the note and trust deed was an act ultra vires the corporation, nor that the defendant Lithuanian Church did not receive the benefit of the loan.

Complainants contend that their bill is based upon the theory that defendant received the money under a written contract which it had the power to execute, and that it cannot now avoid liability by questioning the authority of the persons who made the loan; and they further contend that defendant is attempting to evade the real issue, estoppel, by raising a false issue, viz., that complainants must rely upon a ratification of an alleged unauthorized contract. In Ottawa N. P. R. Co. v. Murray, 15 Ill. 336, it was held that where a corporate company receives money and gives a mortgage to secure its repayment, the company cannot avoid liability by questioning the authority of the persons making the loan. In Aurora Agricultural & Horticultural Society v. Paddock, 80 Ill. 263, the corporation borrowed money and used it

in paying the purchase price of the property described in the mortgage executed in its name to secure the loan. In a foreclosure proceeding the corporation defended upon two grounds, (1) that it had no power to execute the mortgage, and (2) that its stockholders did not authorize it. The court held that the company had the power, and that its stockholders had ratified the mortgage. But the court further held (p. 266):

"Independent, however, of these acts, neither the society nor the stockholders are in a position to interpose the defense attempte to be made to the collection of the mortgage. The money, the paymen of which was secured by this mortgage, was used for the purpose of paying the purchase money the society had contracted in the purchase of the mortgaged premises. Can the society, after it has borrowed appellees' money and used it, when proceedings are instituted to collect it in a court of equity, be heard to say: true, we had your money; the honesty of the debt we concede; we secure its payment by a mortgage, but we had no authority to give the mortgage; the officer who executed the mortgage were not empowered to act by the stockholders. A defense of this character would be contrary to equity, and in conflict with the rules of law, as declared by this court in several well considered cases."

In Lurton v. Jacksonville Loan Ass'n, 187 Ill. 141, the court said (p. 143): "But where the contract is one which the corporation has power to make and is within the scope of its franchise, neither party to the contract who has had the benefit of it can set up as a defense that legal formalities were not complied with or that the power was improperly exercised." (See, also, Weiss v. Fred Bender Store Fixture Co., 207 Ill. App. 72; Kadish v. Garden City B. L. & B. Ass'n, 151 Ill. 531, 538.) If it were necessary, many other decisions to the same effect might be cited.

The cases cited by defendant in support of the action of the trial court do not apply to the question before us. The trial court erred in holding that the first plea was sufficient.

As to the second plea: We do not deem it necessary to refer to a number of sound, technical reasons urged by complainants in support of their contention that this plea is insufficient. Even if it be assumed that the plea sufficiently alleges a lack of authority to execute the mortgage and trust deed in the first instance, nevertheless, there is no denial in the plea of the allegations in the bill that defendant received the proceeds of the loan, used the same in the purchase of the property, entered into possession of the property under the deed and thereafter used it, paid interest on the principal note for a number of years, and joined in two renewal agreements to extend the time of payment. The plea falls far short of showing an equitable defense to the bill.

The fourth plea pleads the five year statute of limitations. It is clearly not applicable to the case stated in the bill. Defendant states, in its brief, that the sufficiency of this plea is to be determined by the answer to the question, "Was the implied promise of the defendant * * * a written promise?" The bill discloses that complainants' case is based upon the written notes and trust deed alleged to have been executed by defendant in 1921. The plea does not deny this allegation and, therefore, admits that the promise was written. The plea is clearly insufficient.

The decree of the Circuit court of Cook county is reversed, and the cause is remanded with directions to the trial court to overrule the first, second and fourth pleas to the amended and supplemental bill, as amended, and for further proceedings not inconsistent with this opinion.

DECREE REVERSED, AND CAUSE REMANDED WITH DIRECTIONS.

Friend, P. J., and Sullivan, J., concur.

39602

REGINALD A. WOODALL,
Appellee,

v.

MacRAE'S BLUE BOOK CO.,
a Corporation,
Appellant.

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

293 I.A. 637

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiff's complaint alleges that he was entitled to the payment of ten per cent of the net profits of defendant corporation applicable to dividends for the fiscal year ending May 31, 1934, on account of services rendered by him as general manager of the corporation; that defendant has refused to deliver to him a copy of the auditor's report for that year and has refused to pay plaintiff the ten per cent; that an accounting is necessary to ascertain the net profits of defendant for the said year. The complaint prays that the court order an accounting for the said year and that plaintiff have judgment of "ten per cent of the net profits of said defendant corporation applicable to dividends" for the said year. The cause was referred to a master in chancery, who found the issues in favor of plaintiff and recommended an accounting and that plaintiff have judgment for the said ten per cent. A decree conforming to the master's recommendations was entered, from which defendant appeals.

In its Brief proper defendant makes but one point, viz: "The term 'per year' or 'per annum' used in a contract of hiring does not fix the duration of the contract of employment, but only

the rate of compensation." In its Argument, however, defendant makes three points: "I. R. A. Woodall was employed by defendant on June 16, 1932. II. R. A. Woodall was employed as president and treasurer, and in no other capacity whatsoever. III. During his second year of service Woodall was entitled to a salary of seven thousand five hundred dollars. He was entitled to nothing more." Plaintiff insists that we should ignore points I and II in defendant's Argument, and practically all of point III, and cites in support of the contention the following from Rule 7 of this court:

"Each party shall file a printed brief, in which, except on the cover, the parties shall be designated plaintiff and defendant as in the trial court. The first brief filed shall contain in the following order and under the respective titles: (I) 'Statement of the Case,' (II) 'Points and Authorities,' and (III) 'Argument.'

"* * *

"Points and Authorities. Points relied on with supporting cases. Cases wherever cited must be by title and number and page of the volume of the official report. (Do not say supra.) No point not contained in such brief shall be raised afterwards either in oral or printed argument or by reply brief or on petition for rehearing.

"The Argument shall be confined to discussion of the points made and cases cited in the brief and no others, and in the order in which the points are made. * * *"

Defendant, in its reply brief, admits that it failed to follow Rule 7, but it asks that we disregard the "technical irregularity" in its Brief proper, and stated, as an excuse for its failure to observe the rule, that no controverted questions of law are involved in the

appeal, and that as points I, II and III in its Argument involve questions of fact only, counsel thought that it was not necessary to include such questions in its Brief proper. While, undoubtedly, we might disregard all points argued but not made in the brief proper (Trust Co. of Chicago v. Iroquois Auto Ins. Underwriters, 285 Ill. App. 317), we have concluded to consider the three points made only in the Argument.

Plaintiff concedes that the point made in defendant's Brief proper states a correct abstract rule of law that would be applicable in a case where a plaintiff was claiming compensation for an unexpired portion of an employment contract where there was an issue as to the duration of the contract, but contends that in the instant case he is claiming only the compensation agreed upon for services that have been rendered and not paid for, viz., the bonus of ten per cent of the net profits applicable to dividends for the second year of his employment, that ended June 19, 1934; and that the evidence overwhelmingly shows that plaintiff was to receive such compensation as long as he remained in the employ of the company.

The master in chancery filed an able and exhaustive report. He found, inter alia, that about February 6, 1932, defendant conducted its business through a board of four directors, Thomas H. MacRae, William C. Miller, Edwin C. Crawford and W. G. Dunckel; that MacRae was the president and treasurer of the corporation, Miller, its vice-president, and Crawford, assistant treasurer; that on February 7, 1932, MacRae died and the corporation continued to function without a president until June 16, 1932; that during said period Miller, Crawford and Dunckel were its sole directors; that about June 1, 1932, at the request of one of the said directors, plaintiff came to Chicago "and * * * met with the three acting Directors of said Corporation, namely: William C. Miller, Edwin C. Crawford and W. G. Dunckel, and

after various conversations, the said three Directors * * * agreed to employ * * * Woodall, and * * * Woodall agreed to be employed by said MacRae's Blue Book Company * * * as its General Manager at a salary of $7,500 per year, and in addition thereto, a bonus equal to 10% of the amount of net earnings of said corporation available for dividends;" that about June 15, 1932, Miller telephoned to plaintiff "that the Directors had decided that in addition to employing * * * Woodall as General Manager, they would also elect him as President and Treasurer of said Corporation, and that Plaintiff agreed to accept said additional duties without any further or additional compensation, and in said conversation, Plaintiff herein was requested by * * * Miller to come to Chicago immediately and assume the responsibilities of his duties as President, Treasurer and General Manager of said Corporation on June 20, 1932." The master further found that plaintiff was duly elected by the directors of defendant corporation as president and treasurer for a period of one year beginning June 20, 1932, and ending June 19, 1933, "and unless otherwise ordered by the Board of Directors, until his successor is elected and qualified;" that plaintiff entered upon his duties as president, treasurer and general manager of defendant corporation about June 20, 1932; "that each month he received his check for the proportionate part of the $7,500 annual salary agreed upon, and that upon the expiration of the first year of his said employment, he received a check representing 10% of the profits of the Corporation available for dividends;" that plaintiff, in the course of his employment, signed his name "at various times as President, or when dealing with the financial affairs of said corporation signed his name as Treasurer, and when dealing with the representatives of said corporation, for the purpose of promoting its sale, signed his name as

Manager of said MacRae's Blue Book Company." The master further found that for the fiscal year ending May 31, 1932, defendant sustained a loss of approximately $16,150, "and for the fiscal year ending May 31st, 1933, after the employment of the Plaintiff herein, the said Defendant Corporation earned a net profit of approximately $17,868."

The testimony of Miller, Crawford and Dunckel, who were directors at the time in question, corroborates plaintiff's testimony that the agreement for employment of plaintiff was as general manager of the corporation, and the master found that plaintiff's proof in that regard was not contradicted by any witness who testified in behalf of defendant. The master stated that the sole contention of defendant was that plaintiff was never employed by defendant as general manager, but that in accordance with a resolution passed by the corporation on June 16, 1932, he was employed in the capacity of president and treasurer. But the master specifically found that the employment of plaintiff, "as General Manager, was definitely agreed upon prior to the meetings of the Stockholders and Directors on June 16, 1932."

This appeal is based solely upon the theory of fact that plaintiff "was employed as president and treasurer, and in no other capacity whatsoever." (Italics ours.) After a careful examination of all of the evidence in the case we are entirely satisfied with the master's finding that plaintiff was employed by defendant as its general manager. Plaintiff was elected president and treasurer of defendant corporation. The parties agree that the by-laws of defendant corporation did not provide for an elective officer having the title of General Manager. The position of general manager is distinct from any of the offices set forth in the by-laws, viz., president, vice-president, secretary and treasurer, and it seems clear from the

nature of plaintiff's work that the relationship between defendant and its general manager, plaintiff, was that of employer and employee. The board of directors controlled the affairs of the corporation. (See Bloom v. Vehon Co., 341 Ill. 200, 206.) The record shows beyond dispute that because of a large loss in operations for the fiscal year ending May 31, 1932, the directors of defendant were anxious to obtain an able person for the position of general manager, and that they selected plaintiff from among a number of applicants for the position. Each of the three persons who were directors of defendant at the time in question testified that on June 2, 1932, they employed plaintiff as general manager of defendant company, at a salary of $7,500 per year plus ten per cent of the net profits of the company applicable to dividends, and that plaintiff accepted such employment. Plaintiff's testimony is in accord with that of the directors. The master found that no witness who testified for defendant contradicted the evidence. That it was legal for said directors to employ plaintiff as general manager under an oral agreement, see Rosehill Cemetery Co. v. Dempster, 223 Ill. 567, 578. The election of plaintiff to the offices of president and treasurer, some days later, did not abrogate the oral contract. Nor did the fact that plaintiff acted as president and treasurer operate as a limitation on his powers as general manager. (See 2 Fletcher Cyc. Corporations (Permanent Ed.) 601, Ch. 11, sec. 666.) Defendant does not contend that the election would abrogate the oral contract if such contract was made, but it argues that the master should not have believed the witnesses who testified that it was made. The master would not have been justified, under all of the facts and circumstances, in disbelieving the testimony offered by plaintiff in relation to the oral contract. Defendant, during the two years of plaintiff's employment, held him out to the

business world as its general manager, and that he performed the duties of that office cannot be reasonably questioned. The by-laws of defendant state that the president, vice-president, secretary and treasurer shall perform the duties "usually appertaining" to their respective offices. The services rendered by plaintiff, as general manager, were undoubtedly beyond the duties "usually appertaining" to the offices of president and treasurer. The office of general manager is of broader import than that of president. (See Wainwright v. F. H. & F. M. Roots Co., 176 Ind. 682.) "The very term [general manager] is said to imply 'a general supervision of the affairs of a corporation in all departments.'" (2 Fletcher Cyc. Corporations (Permanent Ed.) 599, Ch. 11, sec. 665.)

"It is well established that the directors of a corporation cannot receive compensation for the performance of their duty as directors or as officers of the corporation unless compensation is provided for by a by-law or resolution of the board of directors before the services are rendered. This rule applies to a director who is the president, vice-president, secretary or treasurer of a corporation, but it does not apply to a director or officer who has performed necessary services entirely outside the scope of his duties as a director or officer, at the instance of the officers of the corporation having general authority over the affairs of the corporation, under an express promise of payment for such services or under such circumstances as raise an implied promise to pay for them." (Stevens v. Industrial Com., 346 Ill. 495, 498.)

"* * * That an officer or a director of a corporation may also validly contract with the corporation to serve it as an employee and be paid for that service is no longer an open question in this State. The rule that an officer or a director of a corporation cannot receive com-

pensation unless such is provided by the by-laws or resolution of the board of directors before the services are rendered has an exception now as fully established as the rule (4 Fletcher's Ency. 'Corporations,' sec. 2739,) that where such officer or director has performed services clearly outside the scope of his duties as such officer or director, at the instance of someone of the corporation having general authority over its affairs and under a promise of payment for such services, he is entitled to receive pay therefor." (Joy v. Ditto, 356 Ill. 348, 355. See also Joy v. Ditto, 271 Ill. App. 395, 408, and cases cited therein.)

In connection with the above rule of law it must be remembered that plaintiff was employed as general manager on or about June 2, 1932, and that after he was elected president and treasurer of the corporation on June 16, 1932, he also acted as general manager.

The findings of the master are supported by the overwhelming weight of the evidence.

The decree of the Superior court of Cook county should be and it is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottava, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

293 I.A. 638

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9261 Agenda No. 18

In the Appellate Court of Illinois,

Second District

October Term, A. D. 1937

J. A. Kyler,

Appellee,

vs.

L. W. Loptien,

Appellant,

Appeal from the Circuit Court

of De Kalb County

HUFFMAN - J.

Appellant prosecutes this appeal from a judgment of the circuit court of De Kalb County, rendered against him upon a promissory note. The judgment was originally entered by confession, and on motion by defendant, was opened up for the purpose of permitting him to plead to the merits. The plea of the defendant was to the effect that he was relieved from liability on the note because of his discharge in bankruptcy, in which bankruptcy proceedings the indebtedness evidenced by the note had been duly scheduled. Appellee sought to support the judgment by establishing a new promise by defendant after his discharge in bankruptcy. The cause was heard by the court, who found the existence of a new promise as claimed by appellee, and entered judgment to the effect that the judgment by confession was reaffirmed and should stand in full force and effect as of the date originally entered. This appeal follows.

Appellant complains of the testimony of the witness Donna Molander given with respect to the new promise. The abstract fails to show any objections interposed to the testimony of this witness. Therefore, this objection is not available to appellant. Appellant next urges that the evidence of the new promise is wholly different from that as alleged in the pleadings, and therefore a fatal variance exists. One who seeks a reversal

should by the abstract fully present the errors relied upon, and in a sufficient manner for the determination thereof without the court having to resort to the record. Village of Barrington v. Lageschulte, 323 Ill. 343; O'Meara v. C. M. St. P. R.R. Co. 367 Ill. 82. The abstract sets out no pleadings. Under such circumstances this objection is not available to appellant. Welch v. City of Chicago, 323 Ill. 498, 501, 502.

The trial court heard the witnesses and had an opportunity to observe them while testifying. It is not within the province of a court of review to substitute its findings of fact for that of the trial court, unless such findings appear to be manifestly against the weight of the evidence. Alton Banking Co. v. Alton Bldg. Ass'n. 289 Ill. App. 177, 186; Hall v. Pittenger, 365 Ill. 135.

The judgment of the trial court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED E. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On DEC. 4 [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9242 Agenda No. 10

In the Appellate Court of Illinois

Second District

October Term, A.D. 1937

Nelle Sisney,

Plaintiff-Appellee,

vs. Appeal from the Circuit Court

Minnie Wallk, doing business as of Peoria County

Wallk's Furniture House,

Defendant-Appellant,

WOLFE, J.

This suit was instituted by appellee in the Circuit Court of Peoria County, Illinois, on July 1, 1936, to recover damages for personal injuries alleged to have been sustained by her on December 9, 1935, as a result of a fall sustained by her while walking through appellant's furniture store. The original complaint consisted of five counts. On motion of the defendant, count one was stricken and the case went to trial on the four other counts. The complaint alleges that the defendant was conducting a furniture store in the building known as No. 606 to 610 South Adams Street, in Peoria, Illinois; that there was an implied invitation to customers to enter the building and a duty on the defendant to keep the building in a reasonably safe condition; that plaintiff was lawfully upon the premises by the invitation of the defendant and was exercising reasonable care for her own safety; that as a result of the carelessness of the defendant, plaintiff walked upon an uneven portion of the floor and slipped and fell. It is also charged that the defendant maintained a portion of the building in a careless and negligent manner, in that the floor of a part of said building was uneven, and of different floor levels, with a step-down of several inches, and said portion of the building was dark and not properly lighted.

In count three of the petition, the negligence of thedefendant was alleged to have consisted of the failure of the defendant to

erect a warning sign at said doors and uneven places. In count four the negligence complained of is that the defendant failed to place a guard rail to assist persons in passing from one floor level to another. Count five charges that the portion of the building where the accident happened was dark and not properly lighted; that there was no sign of warning or signal, and that the defendant displayed merchandise in an attractive manner around and close to the uneven part of the ploor. All of said counts allege that the plaintiff was in the exercise of due care and caution for her own safety, and because of the negligence of the defendant, the plaintiff fell and was injured and sustained damage.

The defendant filed her answer in which she admitted possession of the building, the operation of the store, and that an implied invitation was given to customers to enter the building. She alleged that she was uninformed as to whether the plaintiff was a prospective customer or was lawfully on the premises. She denied that the plaintiff was in the exercise of due care and caution for her own safety, and denied the several charges of negligence contained in the complaint.

The case was tried by a jury which found the issues in favor of the plaintiff and assessed her damage at $3,500.00. The court entered a judgment on the verdict in favor of the plaintiff and against the defendant. The case comes to this court on appeal.

The appellee, in company with her brother, at about noon on December 9, 1935, entered defendant's store at No. 606 S. Adams Street, Peoria, Illinois, for the purpose of purchasing a chair. No. 606 and 608 are connected by an archway. In going from 606 to 608 there is a step-down of about six inches. As the plaintiff went to pass over this step she slipped and fell, and claims she was painfully and permanently injured. It is not disputed that the appellee was a prospective customer in appellant's store, or that she slipped, fell and was injured. From an examination of the

record it seems to us that the appellee has established by a preponderance of the evidence that at the time she was injured she was in the exercise of ordinary care and caution for her own safety.

The defendant seriously contends that the evidence does not show that the defendant was guilty of any negligence that was the approximate cause of plaintiff's injuries, and therefore, that the verdict of the jury is contrary to the manifest weight of the evidence. There is no complaint that the jury was not properly instructed. Where a jury has been properly instructed as to the law in the case and have reached a verdict, the Appellate Court is not justified in reversing their verdict unless we can say their finding is manifestly against the weight of the evidence. We cannot say that this verdict is contrary to the weight of the evidence.

The appellant claims that the trial court, over their objections, admitted improper evidence. This charge is directed against the testimony of Dr. Fred Stuttle, who testified that he had examined the appellee, and ascertained the extent of her injuries. He testified at length as to what he did in making the examination and gave as his opinion what his diagnosis disclosed, and in his opinion the injuries sustained by the appellee were permanent. He also testified to having an X-ray picture taken of the appellee's foot and what the X-ray disclosed.

The abstract shows the following: "Q. So we resolve ourselves into this, don't we Doctor, that the conclusion which you reached was not based solely upon the result of objective symptoms? A. Yes, that can be said. Q. That is true in this case? A. Yes, Mr. Kavanagh: I move that the answers of the doctor be stricken as no proper foundation has been laid. The Court: He did not answer any conclusions, did he? Mr. Kavanagh: The findings. He testified to findings. The Court; I sustained the objections to his conclusions. Kavanagh: He testified to some findings and he cannot testify to findings that are bases upon <u>objective</u> symptoms (evidently meant to be subjective).

Court: Yes, but I cannot strike his entire testimony. Mr. Gaskins: The findings which were proper were left and others were stricken. The Court: Answers may stand".

In the case of Judy v. Judy, 261 Ill. 470, page 474, the court uses this language: "The only objection made to the testimony of these witnesses was to their competency to testify in the case. They were competent to testify to the execution of the will, and the objection was therefore properly overruled. If any part of their testimony was incompetent that part should have been objected to specifically , but no such objection was made." In the case of Coburn v. Moline, East Moline & Watertown Railway Co., 149 Ill. App. 132, on page 142 this court in passing upon a similar question states: "The motion did not point out any answer made by Dr. Dondanville which appellants desired to have excluded. If this motion had been granted as to Dr. Dondanville, the jury would not be able to know what particulars were excluded. The motion should have pointed out the particular answers which appellants desired to have excluded, or the particular part of the answer, as the case might be". Fontius v. Commercial National Safety Deposit Co., 187 Ill. App. 20. The major portion of Dr. Stuttle's testimony was based upon subjective symptoms and was properly admitted for the jury to consider. The objection of the appellant was general and not specific, and the court did not err in overruling the objection.

Error is also assigned that the verdict of the jury is excessive. We are of the opinion that the verdict is a very liberal amount for the injury which the appellee sustained in this action,, but we cannot say that it is excessive.

We find no reversible error in this case. The judgment of the Circuit Court of Peoria County is hereby affirmed.

Judgment affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

October Term, A.D. 1937.

CLARA REID, Appellee, vs. CITY OF BELVIDERE, a Municipal Corporation, Appellant.	APPEAL FROM CIRCUIT COURT OF BOONE COUNTY.

DAVIS, Presiding Justice.

This is a suit brought to recover damages for personal injuries sustained by the plaintiff and from a judgment in her favor the City has appealed.

On the afternoon of August 6, 1936, as shown by the evidence, appellee and her daughter were riding in her automobile, which was proceeding in a westerly direction on West Pleasant Street in the City of Belvidere. The car had a left hand drive and was being driven by the daughter and came to a stop on the north side of West Pleasant Street in a designated space indicated by orange colored parking lines which ran east and west and parallel with the curbstone on the north side of West Pleasant Street. Appellee was riding on the right side of the front seat beside her daughter and when the car stopped appellee opened the door, looked down and stepped on the curb. She then proceeded to walk west along a foot path which ran parallel with the curb, to the front end of her car and then she went north across the street.

few minutes later she returned to the car, recrossed the street and again passed in front of the car and along the path paralleling the curbstone. In attempting to re-enter the car, she placed her hand on the handle of the front door and as she opened the door, stepped back and in doing so the toe of her shoe on her left foot went into a hole which was located between six and eighteen inches north of the curbstone and between the curbstone and the footpath. It appears from the evidence that many years ago at this point a hollow iron or steel trolley pole had been erected and in 1903 the portion which extended above the ground was cut off with an acetylene torch, leaving the portion of the pole which had been buried in the ground remaining in the ground. The hole surrounded by this casing which remained in the groundd was about six inches in diameter and the casing itself was about one-fourth of an inch thick and the top of it was about one inch below the surrounding surface of the ground and was jagged and at that time appellee stepped into this hole it was filled with water. With the aid of her daughter, appellee extricated her foot but in so doing her ankle was wrenched and the heel was torn from her shoe. She immediately went to the home of her physician who examined her and found a vertical cut two or two and one-half inches long midway between her ankle and knee, the cut extending to within a quarter of an inch of the bone. It was to recover for these injuries that this suit was instituted against the City of Belvidere and a jury having been waived, the cause was submitted to the court for determination, resulting in a judgment for the plaintiff for $35.00 and the record is brought to this court for review.

The abstract of the record furnished this court by counsel for appellant is clearly insufficient and for that reason

the appeal will be dismissed. All the abstract discloses with reference to perfecting this appeal is shown on the first line at the top of page eight of the abstract and is as follows: "Rec. Page 28-Notice of Appeal". It does not show when this notice of appeal was dated or whether it was ever filed in the office of the clerk of the Circuit Court as required by the Statute, or if filed, whether any notice of filing was served upon opposite counsel. What is said in Shaw v. Davis, 339 Ill. App. 447 at page 449 is applicable. "The right of appeal, under the Civil Practice Act, is purely statutory, and the provisions of the act must be complied with, otherwise the appeal is not legally perfected. One of the first requirements of the statute relative to appeal is that notice of appeal be filed in the court from which the appeal is taken; sec. 76, Civil Practice Act, Ill. State Bar Stats. 1935, ch. 110, 204; Jones Ill. Stats. Ann. 104.076; and if the notice be not filed the appeal is not perfected. People ex rel. Dilks v. Board of Education, 283 Ill. App. 375. If there be a failure to file such notice, the attempted appeal is ineffectual and will be stricken. Hunter v. Hill, 284 Ill. App. 655 (Abst.), 2 N. E. (2d) 383. It is elementary that the abstract must show all the necessary steps in the litigation and a compliance with all of the essential requirements as to appeal. Village of Winnetka v. McMartin, 351 Ill. 154; Christy v. Elliott, 216 Ill. 31. The abstract is therefore insufficient for failure to affirmatively show that appellants filed notice of appeal in the trial court within the prescribed time. Where such is true the reviewing court is not bound to entertain the appeal. Watson v. Sullivan, 200 Ill. App. 259; Hour v. Cock, 309 Ill. App. 315. The court of review, in such event, is not required to await a motion by appellees to dismiss the appeal, but may, of its own motion, dismiss such appeal for want of a sufficient abstract. Burk v. Weber, 283 Ill. App. 391, 393."

We might add that notwithstanding the insufficiency of the abstract, we have considered the two contentions of counsel for appellant. As to the first contention that the evidence does not disclose that the hole into which appellee stepped was on city property and that therefore the city is not liable, we find that the evidence does disclose that the city had designated as a parking area or space the place where appellee's car was parked on West Pleasant Street. Appellant therefore invited appellee, upon the occasion in question, to use this parking space and park her car close to and parallel with the north curbstone of this public street, and must be held to have impliedly, if not expressly, invited her to leave and enter her car, when so parked, in the manner she did. The evidence also discloses that there was a foot path, eight or ten inches in width, extending both east and west from the point where appellee's car was parked. Under these circumstances appellant, in our opinion, is liable for damages resulting from its neglect to keep the portion of the parking space lying north of and adjacent to the north curbstone, being the place appellee received her injuries, in a reasonably safe condition. Village of Mansfield v. Moore, 144 Ill. 135.

Appellant's second contention is that the judgment is excessive. Appellee's physician testified that her injuries consisted of an ankle injury and a cut on the front of her left leg. He testified that for about three weeks after the injury appellee called at his office nearly every day and that during this period of time her leg was swollen and that he dressed her wound and prescribed hot applications and advised her to refrain from standing and to keep her leg elevated. He further testified that after the swelling had subsided, appellee continued to call at his office every other day for two weeks and that he kept the leg bandaged for at least six weeks after the injury. While there

is no allegation in the complaint that her injuries were permanent nor is there any proof that they are, still the proof is that at the time of the hearing she was still using a bandage to sustain her arch and Dr. Freeman testified that she suffered considerable pain in her ankle. The experienced trial court before whom this cause was tried, however, possessed many advantages which we do not possess and we would therefore hesitate to substitute our judgment for his.

The abstract furnished by counsel for appellant, being clearly incomplete and insufficient, the appeal will be dismissed.

[illegible] [illegible] [illegible].

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottava, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

IN THE

[illegible] COURT OF [illegible]

[illegible] DISTRICT

October Term, [illegible] 1937.

INA BAIN,

Appellee

v.

FRED BAIN,

Appellant.

[illegible] OF [illegible]

[illegible] INTERLOCUTORY.

LOVE, [illegible] J.

This suit was instituted by Ina Bain, the mother of the defendant, and by Margaret Bain, wife of the defendant Fred Bain, to recover damages for personal injuries sustained by them while riding with the defendant as his guest in his automobile. The trial court struck the count filed on behalf of Margaret Bain, holding that on the date of the accident she was the wife of the defendant and could not prosecute a tort action against him and the cause proceeded to trial upon a second amended complaint filed on behalf of Ina Bain, the mother, and resulted in a verdict and judgment in her favor for $3,000.00 and to reverse that judgment this appeal has been prosecuted.

The evidence disclosed that appellee lives in Stillman Valley, eighteen miles southwest of Rockford, that on May 4, 1936, she came to Rockford and spent the night either at the home of her daughter or at the home of her son, appellant herein, both of whom live in Rockford, that on the next afternoon about four-thirty o'clock appellant was driving his 1935 Ford Tudor Flash sedan and had left the home of his sister and was proceeding from

home to his own home, intending to stop there briefly and then drive his mother to her home in Stillman Valley, where he and his wife intended to remain over night. Appellant's wife occupied the rear seat of the car. Appellant was driving in the front seat with her and, [illegible] driving the car. [illegible] proceeding west along [illegible] street from [illegible] street intersection [illegible] Stillman Valley [illegible] Stillman Valley [illegible] qualified as [illegible] school [illegible] northeast corner of the intersection of Fulton and [illegible] streets. [illegible] appellant's car [illegible] or three feet east of the center line of Fulton street [illegible] about ten [illegible] distance south of a street light of [illegible] when the Lincoln car [illegible] Fulton street, which entered the intersection just before the [illegible] car. The opinion of [illegible] the collision was travelling [illegible] thirty-five miles per hour. [illegible] appellant to the effect that at the time of the collision he was driving his car east on Fulton street approaching Fulton street intersection and facing appellant's car. [illegible] about seventy-five or one hundred feet from the intersection when the collision occurred. That he observed appellant's car as it approached the intersection and that it was travelling at about twenty-five miles per hour. That the speed of appellant's car did not change up until the time of the collision. That he observed the blank car and when he first saw it, it was about fifteen feet from the center of the intersection and travelling about twenty-five or thirty miles per hour and that the collision occurred right in the center of the intersection.

Appellant was called under Section 68 of the Civil Practice Act and testified that he was twenty-eight years of age, that he had driven [illegible] street [illegible] "[illegible]", and upon this occasion was "going around twenty-five [illegible] per hour." He further testified that upon approaching the [illegible] street intersection, he could see [illegible] on that street about one hundred feet, [illegible] be approaching the intersection [illegible] that he did [illegible] collision, when it was only a few feet [illegible] was just about [illegible] that he did not [illegible] his car or not [illegible]. Upon his [illegible], counsel for appellant [illegible] appellant again stated that he did [illegible] north or to the south [illegible], and then was asked: "Did you [illegible], in [illegible], to the right and to the left?" To this question [illegible] objected and the objection was sustained. Counsel for appellant then [illegible] to elicit all the testimony of appellee taken under Section 68 of the Civil Practice Act on the ground that the witness was not the first to observe party. This motion was denied. [illegible] the purpose of this connection and the element of [illegible] that the rulings of the trial court were in accordance with the interpretation of this section of the Practice Act as announced by this court in Combs v. Young, 321 Ill. App. 154.

It is urged by counsel for appellant that the evidence disclosed that at the time appellee was injured appellee and appellant were engaged in a joint or common enterprise and in this connection was [illegible] to the case of Burnett v.

Levy, 213 Ill. App. 189. The facts in the instant case are clearly distinguishable from the facts in the Barnett case. In that case it appeared that the plaintiff and the defendant, together with two other gentlemen, started on an automobile trip to New York and agreed to divide the expenses of the trip among themselves and the plaintiff acted as cashier for the group. In the instant case the amended complaint averred that the plaintiff was a guest of the defendant and had nothing to do with the driving or operating the automobile in which they were riding and that she had no control or direction over the operation of the automobile or its driver. The answer of the defendant denied these allegations and alleged that the defendant was the agent and servant of the plaintiff and that the plaintiff and defendant at the time of the accident were then engaged in a joint or common enterprise. Among the instructions which the defendant tendered to the court at the conclusion of the hearing of the testimony and which the court gave to the jury is the following:

> "The Court instructs the jury that in order that the plaintiff, Ina Bain, may recover in this case, you must find from the evidence and under the instructions of this court all of the following four things:
>
> (1) That the plaintiff, Ina Bain, was a guest in the automobile of the defendant, Fred Bain, at the time and place in question.
>
> (2) That the accident involved was caused by the wilful and wanton misconduct of the defendant, Fred Bain.
>
> (3) That such wilful and wanton misconduct of the defendant, Fred Bain, if any, contributed to the injury or loss for which the plaintiff brings this action.
>
> (4) That the plaintiff, Ina Bain, was not guilty of wilful and wanton misconduct on her part, at and just prior to the time and place in question."

In our opinion the evidence in this record does not sustain appellant's contention that the parties hereto were engaged in a joint or common enterprise but does tend to prove the averments of the complaint to the effect that appellee was the guest passenger

of appellant and the [illegible] given to the jury by the court in her last motion.

It is strongly believed that [illegible] failed to establish [illegible] fault on the part of appellant and that therefore his motion for an instructed verdict should have been granted. The testimony as found in this record tends to prove that the [illegible] occurred [illegible] of Rockford, [illegible] the [illegible] was at the [illegible] time, that the [illegible] were familiar with this location, know the intersection and what precaution is [illegible] speed of [illegible] or thirty-five per hour, that be [illegible] the [illegible] of the rate of speed at which they were travelling, [illegible] at the intersection of [illegible] time, that the [illegible] intersection at the sight of appellant, that appellant does not recall whether he looked [illegible] approached the intersection or whether he increased or decreased his speed after entering the intersection, that he did not see the plaintiff's car until he had proceeded into the intersection [illegible] about the middle [illegible] when appellant's car was struck on the right side just back of the right front wheel. The law is that the driver of a car approaching from the right has the right of way over one approaching from the left unless the car on the right is sufficiently far away so that, if being driven with due care it will not reach the intersection until the car from the left has passed. It is the purpose of the law to give the driver on the right a preference in passing through the intersection and it is the duty of the driver on the left to assume that right of way in accordance with the rule laid down. [illegible] v. [illegible], 114 Ill. App. 60. The evidence in this record plainly and the conclusion

of this cause to the jury and it was not error for the trial court to deny appellant's motions for an instructed verdict nor would this court in view of all the evidence found in this record be justified in holding that the verdict returned was manifestly against the weight of the evidence.

This record is free from reversible error. The jury was properly instructed as to the rules of law applicable to the facts as the evidence disclosed the facts to be and the verdict which the jury returned, having been approved by the trial court, should be affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

General No. 9[illegible]1. Agenda No. 13.

IN THE

SUPREME COURT OF ILLINOIS

NOW ON FILE

October Term, A. D. 1937.

PEOPLE OF THE STATE OF ILLINOIS on the relation of and in the name of Oscar Nelson, Auditor of Public Accounts of the State of Illinois, Appellee (Complainant),	Appeal from the Circuit Court of LaSalle County, Illinois.
vs.	
THE FARMERS & MERCHANTS STATE BANK OF LELAND, Defendant.	
Clarence Newton and Clyde Newton, intervening petitioners, Appellants.	

CLYDE, J.

Clarence and Clyde Newton, doing business as partners under the name of Newton Brothers, have appealed from the decree of the Circuit Court of LaSalle County denying their intervening petition for a preferred claim against the assets of The Farmers & Merchants State Bank of Leland which are now in the possession of a receiver for distribution among the creditors of the bank. Clyde Newton transacted all the business of Newton Brothers with the bank. Henry W. Thompson was assistant cashier of the bank from 1902 to 1932. Spencer M. Grover was an employee of the bank.

The basis for a preferred claim is to be found in the following facts as stated by counsel for the Newton Brothers. In 1925, Mr. Clapsaddle, attorney for the Newtons, at their request placed $5,000.00 with the Farmers & Merchants State Bank for investment. Later Clyde Newton saw Thompson and told him to put it out on good first mortgage securities. Thompson said he would. Thompson admits the transaction, but said his instructions from

Clyde were to get good notes with as high rate of interest as he could.

The bank placed the money in an account which the Newton Brothers carried with it. From that time on Thompson made all the investments. Clyde Newton depended on him for everything. He came into the bank from time to time and occasionally consulted Spencer Grover as to how many notes they had and the amounts of each, but no one in the bank made any loan excepting Thompson, who never consulted Clyde Newton concerning any of the loans. No statement was ever made to Newton Brothers as to where the money was placed nor was an accounting rendered to them. After the bank closed no such statement was made.

The bank closed on February 2, 1932. Shortly afterwards Clyde Newton went to both Spencer Grover and to Mr. Danielson, the president, for his securities and they sent him to Henry Thompson. In April of that year Clyde Newton saw Henry Thompson about the investments. At that time Thompson turned over to Clyde Newton the following notes:

Exhibit 1. Judgment note of George H. Stratton, dated January 1, 1926, in the sum of $600.00, due six months after date, payable to the order of Newton Brothers at The Farmers & Merchants State Bank of Leland, with interest at 7%.

Exhibit 2. Judgment note of Minnie B. Anderson, Clarion Anderson and Tessie Anderson for $2,000.00, dated October 4, 1928, due one year after date, payable to The Farmers & Merchants State Bank of Leland, with interest at 6%. The only endorsement is of interest paid.

Exhibit 3. Judgment note of H. R. Thompson for $500.00, dated March 1, 1929, payable to the order of Newton Brothers, due one year after date, with interest at 6%.

Exhibit 4. Judgment note of H. R. Thompson, dated September 21, 1928, for $200.00, payable to Newton Brothers, due one year after date, with interest at 6%, the only endorsement being February 26, 1930, paid on interest $12.00.

Exhibit 5. Judgment note of H. R. Thompson, dated March 30, 1926, for $300.00, payable to the order of Newton Brothers, on demand, with interest at 6%, with the following endorsements:

March 30, 1929, Paid on within Int. $18.00.
February 26, 1930, Paid on within Int. $18.00.

Exhibit 6. Judgment note of H. S. Thompson, dated February 28, 1930, for $501.00, payable to the order of Newton Brothers, due one year after date, with interest at 7% per annum. No endorsements. (Rec. 137; Abst. 33, 34.)"

There is no evidence that the $5,000.00 or any part thereof, which the appellants claim was given to the bank for investment purposes was set apart. No part of the $5,000.00 as a segregated account has been traced into the bank's assets now in the hands of its receiver. The notes which were delivered to Clyde Newton by Henry Thompson after the bank closed, were taken or received by the bank or Thompson by the use of bookkeeping manipulation of the funds of the Newton Brothers on deposit in their checking account under unusual circumstances, as will hereafter appear. That this checking account of the Newton Brothers was improperly used to foist the worthless notes, above enumerated, on the Newton Brothers, is the essence of their request for a preferred claim against the assets of the bank. It is represented that the situation discloses an imposture. This may be true. This proceeding is not a tort action against the bank for negligence, deceit, or fraud, nor is it an action to enforce a contract liability of the bank. The petition for appellants for a preferred claim presents the question--whether they have superior rights over other creditors of the bank in its assets which are in the hands of the receiver.

There was introduced in evidence the bank's check account sheets of the Newton Brothers, and of Henry S. Thompson; also, the liability, or ledger sheet of the bank, showing the indebtedness of George F. Stratton to the bank. George F. Stratton is the payer of the note introduced in evidence as Exhibit 1. On October 15, 1929, Stratton was indebted to the bank to the amount of $4,100.00. This sum is the aggregate of several notes executed by Stratton and held by the bank. One of these notes for $600.00, is Exhibit 1.

The notes were renewed from time to time but never paid, excepting that Exhibit 1 was shown as paid on the ledger sheet, under circumstances as will shortly be stated. George Stratton was a tenant farmer, owned no land, but possessed some farm tools, machinery and equipment. Four months after the bank closed, Stratton owed the bank on the notes, exclusive of Exhibit 1, $[illegible],[illegible]0.00, and was then adjudged a bankrupt. In January, 1932, less than one month before the bank closed, Stratton owed the bank $4,050.00, of which the $600.00 note was a part. On January 13, 1932, the $600.00 Stratton note was switched from the bank to Newton Brothers, and their account debited with the sum of $601.53. The note, however, remained payable to the order of the bank until April, 1932, when it was turned over to Clyde Newton by Henry . Thompson. At that time Thompson inserted on the face of the note after "Pay to the Order of," and immediately before "Farmers & Merchants State Bank," the words, "Newton Brothers." The bank's indebtedness to Newton Brothers was reduced, and Stratton's indebtedness to the bank was correspondingly reduced. No new money was brought into the bank by the transaction. In the case of Kershaw vs. Julien, 72 Fed. (2d) 528, where the facts were the same as here, the court said: "It was a mere shifting of credits. Since there was no identifiable thing which could be the subject of a trust and no augmentation of the bank's assets, manifestly the assets in the hands of the receiver were not increased by the transaction. There is no reason therefore, for preferring appellee over other creditors of the bank. --Kershaw vs. Jenkins, (C. C. A. 10) 71 Fed. (2d) 647; Kershaw vs. Kimble (C. C. A. 10) 65 Fed. (2d) 533; Blakey vs. Grinson, 336 U. S., 254, 52 S. Ct. 516, 76 L. Ed. 1089, 82 . L. R. 1288.' -- Sherwood vs. Milford State Bank, 94 Mich, 75, 53 N. W., 933.

Exhibit 2. The only evidence relative to the Anderson note is that of Henry . Thompson, the facts of which are as follows:

The principal of the note was originally the indebtedness of .. Lewis Anderson, the father of the makers of the note. His debt was evidenced by his note for $3,000.00. "The .. Lewis Anderson note was held by my sister-in-law, Cora Thompson, who, about October 4, 1925, wanted money to go to the Holy Land," Mr. Thompson testified. "I Considered the note of .. Lewis Anderson a first class loan. I knew that the Newton brothers wanted their money loaned out and I made the investment for them." Two thousand dollars was deducted from the checking account of the Newton Brothers and the money was used, "and picked up," to pay the Lewis Anderson note. The Farmers & Merchants State Bank of Leland had not been requested to take over the Anderson note. "My sister-in-law came to me and said she needed some money. I took care of my sister-in-law the same as I did the Newton Brothers," Mr. Thompson testified. "I had her notes and loaned her money. The note which was held by Cora Anderson had never been the property of the bank."

Exhibit 2 has the endorsements of two interest payments of $120.00 each, both of which were placed in the checking account of Newton Brothers, and they checked against the account. The bank received no proceeds from the transaction.

Exhibits 3, 4, 5, and 6, are notes executed by Henry .. Thompson when he replenished his checking account by making withdrawals from time to time from the account of Newton Brothers. It is not necessary to inquire if Thompson were solvent when this was done, nor to ascertain his motives in so doing.

The Chancellor did not err in rejecting the petition for a preferred claim to the amount of the withdrawals from the Newton Brothers' account as now evidenced by the above notes.

In addition to the notes mentioned, Thompson, on behalf of Newton Brothers, made a real estate loan of $1,000.00 to Nels

Olson in 1937. The whole Olson loan was [illegible] thousand dollars thereof was furnished by the bank, and [illegible] out of the Newton Brothers checking account. The loan was secured by a mortgage on a house in Leland, purchased by Olson for $4,500.00. All of the papers representing the $5,000.00 were in the possession of the bank. In November, 1951, without consulting the Newton Brothers, the bank surrendered the notes and took from Nels Olson a deed in which the bank is the sole grantee. Since that time the premises have been rented at $60.00 a month. Such rental went into the assets of the bank. The Newton Brothers have never received anything which shows that they have any right or title in and to the Olson property.

The decree provides as follows: "That the Farmers & Merchants State Bank of Leland, Illinois, took title to the Nels Olson real estate, as trustee for the benefit of the bank of a two-thirds interest, and for the benefit of Clarence Newton and Clyde Newton to the extent of a one-third interest in said real estate. That when and if said real estate is sold by the receiver of said bank, that the proceeds of said sale and the earnings and profits therefrom from the date said bank acquired title down to the date of sale, and after the payment of all legitimate charges for taxes, repairs, and the expenses of sale are to be prorated two-thirds to the bank and one-third to Clarence and Clyde Newton."

As the receiver will not sell what is known as the Nels Olson property, except under order of the Circuit Court of La Salle County first had, and which order is not to be rendered without the due opportunity of the Newton Brothers to be heard on the propriety of rendering the order, we are of the opinion that the decree justly protects all the rights of the cestuis que trustent, Clarence and Clyde Newton, in the property.

The Chancellor found, in conformity to the Master's findings, that Henry A. Thompson, assistant cashier of the bank,

acted for the bank, and not individually in his dealings with the Newton Brothers. We have concluded that this finding should not be disturbed. (Pershaw vs. Julien, supra; Andrew vs. Citizens State Bank of Bedford (In.), 235 N. E., 735.)

It is apparent from the record that a wrong has been perpetrated on the Newton Brothers. They should be allowed a common claim against the assets of the bank now in the hands of the receiver, to be paid in the due course of receivership, to the amount of $4,100.00, upon the surrender by them of the notes known as Exhibits 1, 2, 3, 4, 5, and 6, to the receiver. The $4,100.00 is the total amount of the exhibits and the total amount shown by the evidence to have been wrongfully taken by the bank from the checking account of the Newton Brothers. Notes so far as necessary to pass title thereto to the receiver, should be endorsed by the Newton Brothers without recourse. The case is reversed and remanded to the Circuit Court of Lagrange County, with directions to modify the decree in conformity herewith.

Case Remanded.

Dove, J.

In my opinion the decree of the Circuit Court should be affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On JAN 21 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

GENERAL No. 9256 GEN. No. 16.

IN THE

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D. 1937.

NELLIE MacADAM,
Complainant,-Appellee,

vs.

JOHN BOWEN, et al.
Defendants-Appellants,
and

DOROTHY SMITH, et al.,
Defendants - Appellees

Appeal from
Circuit Court,
Henry County.

HERBERT I. BOWEN and JOHN BOWEN
Cross-Complainants-Appellants,

vs.

NELLIE MacADAM, DOROTHY GARRISON SMITH, et al.,
Cross-Defendants-Appellees

WOLFE, J.

About July 21, 1925, George Bowen owned several tracts of real estate. At the time of his death, he left surviving as his heirs at law, Roxena Bowen, his widow, Nellie MacAdam, Herbert I. Bowen and John Bowen, his children, and Willy Garrison, Dorothy Garrison and Georgia Garrison, children of his deceased daughter, Dollie Garrison. By her will, Roxena Bowen devised her one-third interest and title to the real estate, and bequeathed all her personal property to Nellie MacAdam.

In 1930, Nellie MacAdam filed a bill for partition of the real estate, making her brothers and nieces defendants to the bill. She alleged that the several parties to the suit are

seized in fee simple of the real estate as tenants in common; that their rights and interests therein are as follows: Herbert T. Bowen and John Bowen, each an undivided one-sixth interest, Nellie Bowen an undivided one-half interest, and Lily Garrison, Dorothy Garrison Smith and Georgia Garrison Walter, each an undivided one-eighteenth interest. The guardian ad litem for Lily Garrison, an insane person, filed a formal answer to the bill.

There was introduced in evidence, an agreement by Nellie Bachdam to give one-third of the net estate of Roxana Bowen which she would receive as sole legatee and devisee of the will of Roxana Bowen to Lily Garrison Smith and Georgia Garrison Walter, share and share alike. The master found that under the terms of this agreement, that the nieces of Nellie Bachdam are collectively entitled to receive one-third of the net estate which she may receive from Mrs. Roxana Bowen's estate. The finding of the master is confirmed by the Chancellor, and the decree of the court fixes the rights and interests of the parties in the real estate by giving full force and effect to the agreement. The decree declares that the parties, and each of them, are entitled as tenants in common to the part or portion of the real estate as follows: Herbert T. Bowen, an undivided nine-fifty-fourths interest; John Bowen, an undivided nine-fifty-fourths interest; Nellie Bachdam, an undivided twenty-one fifty-fourths; Lily Garrison, an undivided five-fifty-fourths interest; Dorothy Garrison Smith, an undivided five-fifty-fourths interest; Georgia Garrison Walter, an undivided five-fifty-fourths interest.

The decree of partition is not contested by Nellie Bachdam, nor by the three nieces. The appeal is by Herbert T. Bowen and John Bowen as cross-complainants under their cross-bill to the bill for partition of Nellie Bachdam.

The cross-bill alleges that an agreement was entered into on January 24, 1927, between Nellie MacAdam, the Cross-complainants, and Roxena Bowen, providing for the management and distribution of the estate of George Bowen; that the agreement superseded the provisions of the Will of Roxena Bowen, insofar as the property of the estate of George Bowen is concerned. The cross-bill prays for partition of the real estate in accordance with the provisions of the agreement, and that Nellie MacAdam make a full and just account of all her acts and doings with relations to the real estate since the death of Roxena Bowen, and all moneys and proceeds received by her prior to the death of Roxena Bowen, and all claimed expenditures on account of said real estate made by Nellie MacAdam, and that she make distribution to cross-complainants and the children of Dolly Garrison, deceased, in accordance with the agreement, or under such arrangement and decree as may be deemed just and fair in the premises; that the Will of Roxena Bowen be set aside and declared void, as to the real estate.

The court in its decree did not fix or determine the rights of the parties on an accounting as prayed for in the cross-bill, but retained jurisdiction for further proceedings in connection with an accounting as may be directed by the court.

The court did by its decree of partition direct partition of the real estate and found the rights and interests of the parties in and to the real estate as hereinbefore stated; the court by its decree of partition held that the agreement dated January 24, 1927 and introduced in evidence by the cross-complainants was wholly void and of no force and effect whatever.

The only question presented to this court is whether the decree of partition fixes, and determines correctly the rights, interests, and titles of the parties to the real estate sought to be partitioned by the bill and cross-bill. This

question requires a determination whether the bill of cross-complainant Bowen devises a one-third interest in the real estate to Willie Mae Cox under the last made of the three wills, that is, the instrument dated January 25, 1937, or whether the instrument transfers the fee to the parties owning the real estate as tenants in common. In the case of Oberto v. Hilton, 340 Ill. page 511, it is stated: "In cases of partition, the bill for partition must set forth the titles of all parties interested in the premises, and the Court, by its judgment is required to ascertain and declare such titles. If the partition is made the title of each co-tenant is transferred to a parcel assigned to him, and if the land cannot be partitioned, sale transfers the entire and title of all the co-tenants to the purchaser. If the subject of the partition is a freehold estate, a fee and is involved,-- and that is the case in this instance. Porter v. Porter, 99 Ill. 330;-Rance v. Brown, 110, Ill. 96." It is also stated in the case of Hesterlik v. Hesterlik, 344, Ill. page. 573, as follows: " Admittedly, a freehold is involved in one order which calls in question the manner of distribution, or the interests in the freehold awarded to the respective parties by the decree of the trial court. In a partition suit [illegible] the title of some of the parties in question, an appeal should be taken directly to the Supreme Court. (Hesterlik v. [illegible], 318 Ill., 72.) The Supreme Court has exclusive jurisdiction in the review of partition cases involving a fee, or in which the title to a freehold is in issue. In a case involving the determination of the rights of co-tenants, a decree for a sale with respect to the ownership of the real estate,- Albert v. The Queen, 161, Ill., 132.

For the reasons stated, the appeal of the cross-complainants is transferred to the Supreme Court of this State.

Appeal transferred to Supreme Court.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

No. 9263. Agenda No. 19.

IN THE

SUPREME COURT OF ILLINOIS.

TRIAL TERM, 1937.

October Term, A. D. 1937.

ARTHUR F. SALTZGIVER, Executor of the Estate of Frank Saltzgiver, deceased,

Plaintiff - Appellant,

vs.

WILLIAM McGRATH, et al.,

Defendant -- Appellee.

SCHAFER, J.

Arthur F. Saltzgiver, executor of the Estate of Frank Saltzgiver, deceased, on March 12th, 1935, brought this suit in the County Court of Kankakee County, Illinois, against William McGrath et al., to recover on a note of $[illegible], dated July 6, 1923, and due on February 1, 1926. The note bears interest at the rate of six per cent per annum from date. The defendants denied that they were indebted to the plaintiff in any sum whatsoever and filed a plea of payment. The case was tried before the Court without a jury and the Court found the issues in favor of the defendants. The suit was dismissed and judgment entered against the plaintiff for costs of the suit. It is from this judgment that plaintiff has appealed the case to this court.

The case was before this Court at a previous term in which we reversed and remanded the case to the trial Court because improper evidence had been admitted on behalf of the defendants. The plaintiff again contends that improper evidence was admitted on behalf of the defendants and that there is no

proof of payment which would entitle the defendants to have judgment in their favor. The note was introduced in evidence and some preliminary proof in regard to how the plaintiff came into possession of it, and thereupon the plaintiff rested its case.

The defendants then offered evidence to show the transactions of Frank Saltzgiver in the First Trust & Savings Bank of Kankakee, which tended to show that this note in question was paid. The defendants also offered proof to show that each and every one of them were financially responsible and able to pay the note at all times after it was due. Proof was also offered which tended to show that all of the defendants were in the habit of paying their bills promptly. The evidence also shows that William McGrath was a tenant of Frank Saltzgiver and his brother. The lease was introduced in evidence which shows that the farm was rented for a cash rental of $500.00 per year payable semi-annually, and each payment being $250.00. The evidence further shows that after this note of $250.00 was given the defendant, William McGrath, remained a tenant of the Saltzgiver farm for five years, and that all of the rent, aside from this one payment of $250.00, had been paid in full. The evidence shows that Frank Saltzgiver in his life time "in his business transactions was exacting in his requirements and demands."

Frank Saltzgiver was formerly the Superintendent of Schools in Kankakee County, and a letter written on the stationary of the Superintendent of Schools dated August 30, 1928, is as follows: "Office of County Superintendent of Schools Kankakee County, Illinois. Frank Saltzgiver, Superintendent. John Bouchard, Asst. Supt. Kankakee, Illinois. August 30, 1928.

Mr. William Schrath, Pontiac, Ill. Dear William: I have been expecting you to have seen you at the fair but was disappointed but think you must have been very busy with your threshing. Now William Bro. Art wants the farm for next year and of course being my brother I have rented it to him, not because I was dissatisfied with you but because of my brother.

I thought I would let you know early so it would not discommode you in any way and hope that you will see it in the right light. Very respectfully."

It will be observed that this letter is not signed. Arthur Baltzgiver was called as a witness for the defendants and testified that there were three brothers in the Baltzgiver family, viz: - Frank Baltzgiver, a brother George and himself; that his brother George Baltzgiver had nothing to do with the office of County Superintendent of Schools. This letter is not signed, but there is a strong presumption in favor of the defendant that it was written by Frank Baltzgiver, and it will be noted that this letter was written long after the note in question was due and no mention was made of the over due note. All of this evidence, we think, was properly admitted to show the circumstances surrounding this transaction. Probably any one single item would be insufficient to overcome a prima facia case that the note had not been paid, but taking them all together it is our conclusion that the Court could rightfully have found the issues in favor of the defendants. The trial Court had the opportunity to hear and observe the witnesses as they testified. It was his duty to weigh the evidence and consider all of the transactions as disclosed by the evidence. He has found the issues in favor of the defendants, and it is our conclusion that the evidence in this case preponderates in favor of the defendants.

All the defendants were called as witnesses in their own behalf and each testified that no one made a demand on him for the payment of the note after August 24, 1926. The appellant contends that each of these witnesses was incompetent under the Statute, because the plaintiff was sueing as executor of the Last Will and Testament of Frank Saltzgiver, deceased. A part of Rule VIII of this Court under title "Abstracts", is as follows: "The Abstract must be sufficient to present every error relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision unless the opposite party shall file a further Abstract, making necessary corrections and additions." The Abstract in question does not show that any objection was made to any of the testimony of the defendants. Therefore, this Court cannot discuss this assignment of error.

We find no reversible error in the case and the judgment of the County Court of Pankakee County is hereby affirmed.

Affirmed.

STATE OF ILLINOIS, }ss.
SECOND DISTRICT

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottava, on Tuesday, the 5th day of October, in the year of our Lord one thousand nine hundred and thirty-seven, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED W. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

General No. 9365 Agenda No. 34

IN THE

APPELLATE COURT OF ILLINOIS

Second District

October Term, A.D., 1937.

TERRY LEWIS, Appellee, vs. PETER WIEMANN and LESTER WIEMANN, Appellants.	)	Appeal from Circuit Court, Will County.

HOLDEN, J.

Terry Lewis started suit against Peter Wiemann and Lester Wiemann for personal injuries that are alleged to have been sustained by reason of an assault and battery made by the defendants upon the plaintiff. The complaint consists of one count in which the plaintiff alleges that on or about October 15th, 1934, the defendants "assaulted him, and wilfully and maliciously beat and maliciously beat and struck the plaintiff with an iron bar, and with other instruments and weapons, and with their fists, and rendered him unconscious, and causing the plaintiff great pain and suffering and permanent injuries."

To the above complaint the defendants, Peter Wiemann and Lester Wiemann, filed their answer, in which they say: "that they, the defendants, did the acts complained of in necessary self defense; that at the time and at the place alleged in the complaint, the complainant, Terry Lewis, first assaulted and wilfully and maliciously beat and assaulted the defendants with clubs and an iron bar, and the defendants then

in self defense, struck the plaintiff, Harry Lewis, causing him some injury, but not rendering him unconscious, nor causing permanent injuries, as alleged in the complaint.

The case was called for trial before the Judge of the Circuit Court, who heard the case without a jury. Before evidence was introduced in behalf of the plaintiff, the defendants, through their attorney, made a motion that the complaint be dismissed "because the complaint is a suit brought for assault and battery, the answer of the defendants sets up that the acts complained of were done in necessary self defense. No reply having been filed thereto, the plea of self defense, the plea in the answer is admitted, and therefore, the complaint should be dismissed." The motion to dismiss was overruled, and the court proceeded to hear evidence on behalf of the plaintiff. At the conclusion of the evidence in behalf of the plaintiff, the defendants again entered their motion to have the case dismissed and assigned practically the same reasons as entered in their original motion. This motion was likewise overruled by the court, and the defense then offered evidence. At the conclusion of the hearing of the evidence, the Court found each of the defendants guilty and assessed the plaintiff's damages at $1,000. It is from this judgment that this appeal is prosecuted.

It is first insisted by the appellants that there was no issue for the court to try as their answer sets forth new matter which was a complete defense to the action of the plaintiff, and as there was no reply filed by the plaintiff to this new matter, it should be taken as confessed and true. Section 58 of the Practice Act (Chapter 110, Sec. 136, Ill. S. A. 58) states in part as follows: "The first pleading by the defendant

should be designated as an answer. When new matter by way of defense or counterclaim is pleaded in the answer, a reply shall be filed by the plaintiff." A part of section 43 of said Act is as follows: "The General Issue shall not be employed, and every answer and subsequent pleading shall contain an explicit admission or denial of each allegation of the pleading to which it relates. Every allegation, except allegations of damages, not explicitly denied, shall be deemed to be admitted, unless the party shall state in his plea that he has no knowledge thereof sufficient to form a belief." It is our conclusion that the answer of the defendant setting forth new matter which, if true, was a complete defense to the plaintiff's cause of action, and the plaintiff, failing to file a reply denying this allegation, admitted the truth of the facts set forth in the defendants' answer, so there was no issue of fact to be tried by the court.

It is conceded that Lester Wiemann is a minor, and at no time during the proceedings has a guardian ad litem been appointed to represent this minor defendant, and the appellants urge this as reversible error. This court had occasion to pass upon this subject in the case of Ruby Collins vs. Whistings, 283, Ill., pp. 604, in which the court held, "that failure to appoint a guardian ad litem for an infant defendant is an error which the minor cannot waive unless it affirmatively appears in the record that one was appointed to appear and answer for the infant party, and the decree or judgment entered below, will be reversed."

The appellees seriously contend that even if this court had been of the opinion that the case should be reversed as to Lester Wiemann, the judgment should stand as against the father,

eter Niemann. The appellee in his brief, after discussing the facts of the case, says, "The court, therefore, in assessing damages could, and undoubtedly did assess punitive or exemplary damages, and no doubt, assessed part of the damages as smart money or exemplary damages." This court has no way of knowing what amount the trial court found as actual damages which the plaintiff sustained, or how much was assessed for smart money, or whether or not the smart money was assessed on account of the acts of Peter Niemann, or of Master Niemann. It would be difficult for this court to say that the judgment should be reversed as to one of the defendants and affirmed as to the other. The judgment is reversed and remanded to the Circuit Court of Will County.

Reversed and remanded.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

9210

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

293 I.A. 639

BE IT REMEMBERED, that afterwards, to-wit: On FEB 1 1938 the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9246 Agenda No. 11

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1937

Oscar Nelson, as Auditor of Public Accounts of the State of Illinois, (William Asteroth, et al,

Appellants,

vs.

The Savings Bank of Kewanee, Illinois, a Corporation, et al (Charles D. Terry, Receiver, etc.,

Appellee)

Appeal from the Circuit Court of Henry County.

DOVE - P.J.

The record in this case discloses that in 1926 and for some years prior thereto Messrs. Fischer, Gould and Burge were a co-partnership, doing a real estate brokerage business and having an office in the City of Kewanee in the banking building of the Savings Bank of that city. On March 1, 1926 Verne Hiler of Rockwell City, Iowa, negotiated a loan through this firm and he and his wife executed various notes aggregating $10,000.00 and secured the payment thereof by a trust deed which named John Fischer, one of the members of the firm, as trustee, and William E. Gould, another member of the firm as successor trustee. These notes were all executed by Verne Hiler and Sylvia Hiler, his wife, were by them endorsed in blank and matured on March 1, 1929. Shortly after their execution, Messrs. Fischer, Gould and Burge sold some of these notes to William Asteroth, M. H. Mowen and Katherine Luecke, who are the owners and holders thereof. Five of these notes were also sold by Fischer, Gould and Burge to John H. Gold, who died on February 18, 1933 and his administratrix has been substituted as a claimant. On March 30, 1927 Verne Hiler, the maker of these notes, desired to pay off this loan and through the Capital City State Bank

of Des Moines, Iowa, wired the Savings Bank of Kewanee to this effect. W.E. Gould was president of the Savings bank and Sam D. Burge was cashier thereof and they were members of the firm of Fischer, Gould and Burge and on the same day, March 30, 1927, that the bank was advised that Hiler desired to pay off his loan, Gould, as president of the Savings Bank, wrote the Capital City State Bank of Des Moines as follows:

> "As per telegraphic instructions from Verne Hiler of Rockwell City, Iowa; we are sending to you herewith for collection deed of trust and release of the same which is to be delivered to him upon the payment to you for us in the sum of $10,300.00 * * *. The notes secured by this mortgage are in the hands of our customers and we will call them in and cancel them and forward to Mr. Hiler, in a short time".

On April 2, 1927 the Des Moines bank acknowledge receipt of this letter and sent to the Savings Bank its draft drawn on the Illinois Merchants Trust Company of Chicago for $10,200.00 and payable to the order of the Savings Bank. Accompanying this draft was a letter from the Des Moines bank stating that it was withholding $100.00 as the attorney for Mr. Hiler objected to the release executed by Mr. Gould and desired a satisfactory affidavit showing that the original trustee John Fischer was dead. This letter and draft were received by the Savings Bank on April 4, 1927 and the draft was paid in due course on April 5, 1927. The requisite affidavit having been furnished Hiler, the Des Moines bank sent another draft on April 5, 1927 for $100.00 payable to the order of the Savings Bank. On April 6, 1927, this draft was received by the Savings bank and on the day of its receipt it was forwarded to its correspondent bank in Chicago and paid in due course.

On September 15, 1927, the Savings Bank of Kewanee ceased to do business and subsequently the Auditor of Public Accounts appointed Chas. D. Terry receiver and thereafter filed his bill in the Circuit Court of Henry County to liquidate the bank. On May 7, 1928, William Asteroth and John Gold, as owners of several of the Hiler notes, filed their preferred claims with the receiver and subsequently, on January 17, 1929 Katherine Luecke and M. H. Bowen, also owners of some of the

Hiler notes, likewise filed their preferred claims with the receiver. No further action seems to have been taken until February 12, 1934 when the receiver filed in the liquidation proceedings in the Circuit Court his petition for instructions as to whether these claims should be allowed or disallowed and if allowed whether they should be classified as preferred or general claims. Each of the original claims set forth substantially the foregoing facts and alleged that the money so received by the Savings Bank from the Capital City State Bank was wrongfully and fraudulently placed by said Savings bank to the credit of Fischer, Gould and Burge. The petition of the receiver made these several claims a part thereof and alleged that each claim revealed that the proceeds of the drafts aggregating $10,300.00 were, on or about April 4, 1927, placed by said Savings Bank to the credit of Fischer, Gould and Burge. On April 16, 1934 the claims were, by leave of court, amended, by striking out the allegations therein that this $10,300.00 was by said Savings Bank wrongfully and fraudulently placed to the credit of Fischer, Gould and Burge. Upon the hearing the claimants introduced their proof and at the conclusion thereof, the chancellor, on motion of counsel for the receiver, entered an order disallowing said claims either as preferred or common claims and from that order the record is brought to this court for review.

When Verne Hiler, the maker of these notes, determined to pay off these notes, he communicated that fact to the Capital City State Bank of Des Moines, which bank, acting for him, so advised the Savings Bank of Kewanee, at which place these notes, although they had not matured, were payable. William Gould, the president of the bank, stated that these notes were then in the hands of customers of the bank and that the bank would obtain them, cancel them and forward them to Mr. Hiler within a short time. This was not done although Hiler caused the Des Moines bank to transmit to the Savings Bank the amount due on his obligations. Appellants

were then the owners and holders of these notes and the officials of the Savings Bank knew they were and when the correspondent bank of the Savings Bank placed the proceeds of the two drafts which the Savings Bank received from the Capital City State Bank to the credit of the Savings Bank, its assets were augmented to the extent of $10,300.00. This amount came into the hands of the Savings Bank for just one purpose and that purpose was to discharge Hiler's obligations evidenced by his several notes, some of which appellants held, and the officials of the Savings Bank knew that this was money which was to be used for that purpose and none other.

Counsel for the receiver argue that in the instant case it was the duty of appellants to show not only that the funds in question came into the bank but that they remained there to augment the resources of the receiver. The record is silent as to what became of the $10,300.00 after it was credited to the account of the Savings Bank. The bank closed its doors on September 15, 1927 and the evidence is that the daily balance in the bank in cash, together with the amount due it from its correspondent banks, between April 2, 1927 and that date, was never reduced below $40,000.00. Just what disposition the bank made of this $10,300.00 does not appear. If it did go to the credit of the brokerage firm of Fischer, Gould and Burge is not shown by any evidence in this record and as it is conceded that appellants traced this fund of $10,300.00 into the hands of the Savings Bank and that from the time it received it until it closed its doors, it always had in its vaults and to its credit with its correspondent banks a sum in excess of that amount, it is our opinion that it then devolved upon the receiver, in order to defeat appellant's claim, to show what became of it.

Counsel for appellee further argue that the record discloses that the transaction involved herein was the private business of Fischer, Gould and Burge and that a member of that firm used the

facilities of the Savings Bank of which he was president to transfer funds of a mortgagor in Iowa to the partnership account of Fischer, Gould and Burge and that therefore the money never became a part of the assets of the Savings Bank. The trouble with this argument is that it is not borne out by the testimony found in this record. The Savings Bank, through its president, sent the release and trust deed to the Des Moines Bank. In doing so the letterhead of the Savings Bank was used. It is true that this letterhead also had a reference to the firm of Fischer, Gould and Burge but the letter was written not in reply to an inquiry directed to that firm, but in reply to an inquiry directed to the Savings Bank and purported to be the letter of the president of that bank. In reply to this letter the Savings Bank, not the firm of Fischer, Gould and Burge received the drafts aggregating $10,300.00, both payable to the order of the Savings Bank and the Savings Bank thereupon endorsed these drafts and the proceeds thereof were credited to the account of the Savings Bank. It does not appear that the firm of Fischer, Gould and Burge were ever authorized by appellants to receive the money which was placed in the custody of the Savings Bank by Hiler, the maker of the notes appellants held, nor does it appear from this record that the firm of Fischer, Gould and Burge ever received it.

In our opinion the court erred in granting appellee's motion at the conclusion of appellant's evidence and in decreeing that appellants are not entitled to either a preferred or common claim and for that error the decree will be reversed and the cause remanded.

REVERSED AND REMANDED

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32) 7

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

293 I.A. 640

BE IT REMEMBERED, that afterwards, to-wit: On [illegible] the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9253 Agenda No. 14

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1937

People of the State of Illinois,
ex rel, William M. Palzer,

Appellant

vs.

City of Kankakee, et al.,

Appellee.

Appeal from the Circuit
Court of Kankakee County.

DOVE, P.J.

A petition for a writ of mandamus having for its purpose the reinstatement of William M. Palzer to the office of fireman on the Fire Department of the City of Kankakee was, upon a hearing before the Circuit Court of Kankakee County, dismissed at the costs of the relator and the issuance of the writ sought denied and from that order this appeal has been prosecuted.

From the stipulation of the parties, it appears that in 1898 the City of Kankakee, by ordinance established a Fire Department, the officers thereof consisting of one chief, one assistant chief and ten firemen. On May 2, 1927, while this ordinance was in effect, the then Mayor of Kankakee appointed twelve persons as firemen, as well as a chief and an assistant chief and among those appointed was William M. Palzer, the relator herein, whose name appears as the tenth upon the records of the city council. These persons filed their bonds which were approved by the city council and filed their appropriate oaths of office but the records of the Fire and Police Commission does not show that Palzer ever took the required physical examination but he served and drew a salary from the city from the time of his appointment until May 4, 1935.

On September 4, 1928 the City of Kankakee adopted the Fire and Police Commissioners Act and the Mayor appointed the first Board of Commissioners and this board adopted appropriate rules and regulations governing the Fire and Police Departments. On May 26, 1933, Palzer, along with ten other persons then serving as firemen, took an examination under the commissioners, received a grade of ninety percent, took an oath and filed a bond as a fireman and continued to draw his salary as a fireman. On June 7, 1933 the Board of Commissioners adopted a resolution assigning to temporary duty in the fire department three persons as captain, eight persons as fireman and two persons as extra firemen. Palzer was not named in this resolution. On August 7, 1933 the Board of Commissioners adopted a further resolution to the effect that those persons named in the resolution of June 7, 1933 be given permanent assignments. On May 4, 1935 the Commissioners adopted a further resolution declaring that an extraordinary exigency existed by reason of the fact that two group of firemen were serving and that the records did not show who were the qualified members of the fire department and by this resolution temporarily appointed a chief, an assistant chief and thirteen firemen and suspended Palzer and all the others from serving. On June 7, 1935, Palzer served a written demand on the commissioners to be restored as a fireman and thereafter filed his petition with the commissioners. Thereupon the commissioners notified him that a hearing would be had at the Mayor's office on July 1, 1935. At this hearing Palzer did not appear and the commissioners at this time adopted a resolution making his suspension permanent. A year later this proceeding was instituted and the question presented for decision is whether or not Palzer was a de jure officer on May 4, 1935 at the time of his removal as fireman. If he was a de jure officer he could only be removed or suspended from office for cause, upon written charges being preferred and after he had been given an opportunity to be heard.

Counsel for appellant concede that when, on May 2, 1927, the Mayor appointed twelve persons to act as firemen, he exceeded his powers and the city council likewise exceeded its powers in confirming the appointment inasmuch as the ordinance establishing the Fire Department only provided for ten firemen, but it is the contention of counsel that inasmuch as the record of the city council discloses that Palzer's name appears as the tenth person in the list of twelve which the Mayor appointed and which the council confirmed that therefore he was a de jure officer and that the remaining two persons were not even de facto officers but were intruders or usurpers. We are unable to agree with this contention. The Mayor appointed twelve firemen at one time, the council approved all twelve appointments and subsequently approved the bonds of all twelve and the records of the council disclose that in so doing their names do not appear in the same order as they appeared in the record showing their appointment. Counsel state that they have been unable to find any authority sustaining their contention in this respect nor have we been able to find any. The law is clear that in order to be restored to an office the party so seeking has the burden of establishing that he is an officer de jure and not de facto, and in our opinion the record in the instant case does not disclose that Palzer was a de jure officer. People ex rel Reilly v. City of Kankakee, 238 Ill. App.192.

Section twelve of the Fire and Police Commissioners Act as amended in 1937 provides that members of the Fire or Police Department of cities adopting that Act who have been such for more than one year prior to the adoption of the Act by such city shall not be removed or discharged except for cause, upon written charges and an opportunity to be heard in their own defense. Ill. Rev. Stat. 1937, Chap. 24, par. 854. Prior to the amendment of 1937 the provisions of this section applied to the members of a fire or police department who have been such for more than one year prior to the passage of the Act by the legislature. (Ill. Rev. Stat. 1935, Chap. 24, 854. By the amendment of 1937 the provisions of this

section applied to the members of the fire or police departments who were such members for more than one year prior to the adoption of the Act by the city. Counsel for appellant in his argument says that he appreciates the fact that the amendment of 1937 can have no retroactive effect and that he realizes, too, that the Appellate Court of the Third District, in Burley v. Barber, 286 Ill. App. 486 construed this section of the Statute prior to the amendment in 1937 to mean that officers of a police or fire department could not be removed or discharged except for cause provided they had been such officers for more than one year before the passage of the Act by the legislature. Counsel insists, however, that there are some expressions used by this court in The People, ex rel Holz v. City of Kankakee, 285 Ill. App. 597, from which he concludes that this court is not in accord with the holding in the Burley v. Barber, supra. In the Holz case we were not called upon nor did we construe the legislative meaning of Section 12 of the Fire and Police Commissioners Act. The contention that the language used by the legislature in Section Twelve before it was amended when it said "One year prior to the passage of the Act" should be construed to mean "one year prior to the adoption of the Act by such city" is without merit. Counsel would have us give to Section Twelve the same meaning before and after it was amended. The intent of the legislature was clear before the section was amended and the construction placed upon it in Burley v. Barber, supra, is the only construction possible of the language employed by the legislature and there was nothing said by us in the Holz case in conflict therewith.

The judgment of the trial court was right and that judgment will be affirmed.

JUDGMENT AFFIRMED.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

AT A TERM OF THE APPELLATE COURT,

Begun and held at Ottawa, on Tuesday, the 1st day of February, in the year of our Lord one thousand nine hundred and thirty-eight, within and for the Second District of the State of Illinois:

Present -- The Hon. FRANKLIN R. DOVE, Presiding Justice
Hon. FRED G. WOLFE, Justice
Hon. BLAINE HUFFMAN, Justice
JUSTUS L. JOHNSON, Clerk
RALPH H. DESPER, Sheriff

293 I.A. 640

BE IT REMEMBERED, that afterwards, to-wit: On FEB the Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, to-wit:

Gen. No. 9254 Agenda No. 15

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, A. D. 1937.

DURALITH CORPORATION, a Corporation,

Appellant

vs.

FABER - MUSSER COMPANY,

Appellee.

APPEAL FROM CIRCUIT COURT PEORIA COUNTY.

HUFFMAN - J.

This was a suit in assumpsit brought by appellant against appellee to the May term, 1933, of the Circuit Court of Peoria County. It arose out of a transaction whereby the appellee is alleged to have purchased from appellant some two thousand dollars worth of a material bearing the trade name of "Duralith," which was a product manufactured and distributed by appellant as a wall paint for the interior finishing and decoration of houses and other buildings. The transaction occurred in November, 1932. Following the shipment of the material to appellee, a controversy arose between the parties with respect to the representations under which appellee claimed to have purchased the material. Appellee returned the merchandise to appellant by prepaid freight on February 15, 1933. Appellant received the same. This suit was brought for the recovery of the purchase price of the material. Trial was had by jury, which returned a verdict in favor of defendant appellee. Appellant prosecutes this appeal from the judgment rendered on the verdict.

Appellee was a company engaged in the retail sale of building materials, in the City of Peoria. The defense was that of accord and satisfaction, and fraud. The evidence on the part of appellee was to the effect that a representative of appellant company came to the office of appellee with sample plaques showing the use of Duralith as a wall covering to be used in the place of wall paper or other wall covering materials; that the representative was advised that appellee would not be interested in a material of this character unless the same was washable, whereupon appellee was told that the material after once applied to the walls, was washable. Subsequently, representatives of appellee went to the office of appellant company in Chicago where they were met by various of appellant's representatives, who it is claimed by appellee proceeded to demonstrate the washable character of Duralith and represented that it contained secret ingredients which permitted it to be dissolved in water prior to the use thereof, but which after the material was placed on the wall and permitted to dry, were insoluble and thus rendered the material washable. The evidence of appellee further shows that its representatives stated appellee was not interested unless the material was washable as claimed, whereupon certain representatives of appellant proceeded to smear dirt on a wall which they represented had been covered or painted with Duralith, and permitted the smear to dry, after which the same was washed off with a wet sponge, leaving the wall looking as good and the same as it was before the dirt had been smeared thereon. It is claimed by appellee that following this demonstration, the contract for the purchase of the material was signed, which contract gave to appellee the exclusive right for the distribution of this wall covering material in that city.

Following the above demonstration as made at the offices of appellant in Chicago, the merchandise was shipped to appellee, and certain other representatives of appellant were sent to appellee's

office in Peoria for the purpose of giving demonstrations of this material to the building contractors and interior decorators of that city. It appears from the evidence of appellee that when these men arrived and the demonstrations were begun, it was discovered that Duralith was not washable, but would disintegrate and come off when water was applied thereto, leaving the wall bare. The representatives of appellant who were conducting the demonstration stated that Duralith was not washable and that in order for the wall to be made washable after Duralith was applied, that it had to be covered either with shellac or clear varnish. Appellee also claims to have received information from this representative of appellant, that the wall upon which the demonstration was made in Chicago, had a coating of shellac over the Duralith. Upon receiving this information, the appellee stopped all demonstrations, and a series of correspondence was had between appellee and appellant, wherein appellee claimed the material was not as represented and that it could not use it and would not receive same. Appellee refused to sign the trade acceptances that were sent out for the purchase of the material and which were to be signed within thirty days if the material was not then paid for. As a result of the correspondence and communications between the parties, appellee received two telegrams on February 13, 1933, advising it that appellant's representative would be there that day. These telegrams were as follows:

" Bloomington, Ill., Feb. 13, 1933.

Willard B. Gaskins Peoria Life Bldg

Will be at Faber Musser at six fifteen today Am attorney for Duralith Corporation Would like to have you present

Benjamin Tannenbaum

Urbana, Ill., Feb.13, 1933

Faber and Musser Co. 100 Edmund St Peoria Ill

Our Mr. Tannenbaum will be at your office at 615 today

Duralith Corp "

The evidence of appellee with respect to the visit of Mr. Tannenbaum is to the effect that he was advised of the representations made by appellant regarding the washable qualities of the wall material, that appellee did not intend to keep the same and in no way considered itself obligated to do so. It is claimed by appellee that the result of this conference was, that Mr. Tennenbaum stated to the representatives of appellee that he had wanted to make some proposition which would be mutually satisfactory, but that since appellee was not interested, that the only way the matter could be settled and disposed of was for appellee to return the material, freight prepaid, to appellant at New York City, from where it had been shipped. Appellee claims that it agreed to do this and the evidence shows that the material was shipped to appellant prepaid, at New York City on February 15, which was two days after the visit of Mr. Tannenbaum.

Appellant complains of the refusal of its fifth and sixth instructions. We see no error in the refusal of these instructions as they invaded the province of the jury in stating facts which were questions for the jury to decide. Appellant also complains of appellee's given instruction No. 6. We find nothing in this instruction to warrant a reversal of the case. Appellant further complains of its refused instruction No. 9. The principle involved in this instruction is fully covered by several other instructions given on behalf of appellant. Where several instructions embodying the same legal principles are offered, the court is not bound to give all of them, but may select and give such as are deemed fit and proper.

The questions involved in this case are questions of fact. There was positive evidence on the part of appellee going to show misrepresentations with respect to the merchandise purchased, and a return of the goods following a discovery of the alleged misrepresentations. This was a question for the jury, and

the jury by its verdict found in favor of defendant. The only witness on behalf of appellant was Mr. William Leiner, President of appellant company. He lives in New York City, and was not present during any of the transactions involved herein.

From an examination of the record we are of the opinion the issues were fairly presented to the jury and the jury properly instructed thereon. Under such circumstances, a court of review will not disturb the verdict unless it appears the same is manifestly against the weight of the evidence. The judgment of the trial court is therefore affirmed.

Judgment affirmed.

STATE OF ILLINOIS,
SECOND DISTRICT } ss.

I, JUSTUS L. JOHNSON, Clerk of the Appellate Court, in and for said Second District of the State of Illinois, and the keeper of the Records and Seal thereof, do hereby certify that the foregoing is a true copy of the opinion of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of said Appellate Court, at Ottawa, this_____day of _____in the year of our Lord one thousand nine hundred and thirty-_____

_____
Clerk of the Appellate Court

(73815—5M—3-32)

PUBLISHED IN ABSTRACT

Jesse B. Parks, Administrator of the Estate of Jesse T. Morrison, Deceased, Plaintiff-Appellant, v. Henry C. Gott, Defendant-Appellee.

Appeal from Circuit Court of Sangamon County.

OCTOBER TERM, A. D. 1937.

Gen. No. 9095 **Agenda No. 20**

MR. JUSTICE DAVIS delivered the opinion of the court.

Jesse B. Parks, administrator, commenced an action in the circuit court of Sangamon county, Illinois, to recover damages suffered by the widow and next of kin of his intestate, Jesse T. Morrison, occasioned by his death alleged to have been caused by the negligent conduct of Henry C. Gott, defendant, in the operation of his automobile.

The complaint consisted of six counts, charging general negligence, violation of the statute relating to cars passing each other going the same direction, driving at an excessive rate of speed, with wilful and wanton negligence and wilful and reckless driving, and that because thereof he ran into and struck the motorcycle upon which plaintiff's intestate was riding. The answer of defendant denies the charges of negligence and wilful negligence alleged in the complaint.

It appears that the deceased and his wife, Norma Morrison, were riding on a motorcycle going south on the right hand side of Route 66, about a mile north of Glenarm in Sangamon county, at which point a collision occurred between the motorcycle of deceased and the automobile of defendant. Mrs. Morrison was riding behind her husband in the buddy seat. Deceased was a baggageman, working in Springfield for the Chicago & Alton Ry. Co., and resided at Auburn. On this evening, July 22, 1936, deceased and his wife went to Springfield for a few hours and started home between 9:30 and 10:00 o'clock in the evening, and were traveling at about thirty to thirty-five miles per hour, and had good lights on the motorcycle which were burning. At about the time of the collision a car, driven by Albert Schneider, was traveling north on the east side of the pavement and the car of defendant, Henry C. Gott, was going in the same direction and trailing Schneider's car. A jury was duly

impaneled and sworn to try the cause. Albert Schneider and Norma Morrison, wife of deceased, testified as witnesses for the plaintiff. After which plaintiff rested his case, whereupon defendant moved the court to direct a verdict in his favor. The court allowed said motion and the jury, by direction of the court, returned a verdict finding the defendant not guilty, and thereupon the court entered a judgment in bar of the action.

The report of proceedings at the trial shows that after the jury had been sworn to try the issues in said cause, and after the opening statement in behalf of plaintiff, Louis Gillespie, attorney for defendant, made a statement of the case to the jury on his behalf, in which he said, among other things: "Gott was driving his four-door Ford sedan. He had trailed Schneider's car for sometime. At about this time Gott increased his speed to pass the Schneider car that was ahead of him. He looked down and saw the light of this motorcycle about a block and a half away. Gott was about a car or two car lengths behind him. He turned out to pass Schneider's car. It was then he saw the motorcycle. He tried to turn back but was not able to get back before the motorcycle hit him. We have a picture of Gott's automobile; the mark on Gott's car shows the motorcycle was going at a high rate of speed."

Albert Schneider testified that he was traveling in an automobile, with his wife and children, north on the east side of Route 66 about a mile north of Glenarm when he met a motorcycle with Mr. Morrison and his wife on it, and it just got past us when the crash came. The motorcycle was traveling on the west side of the black line, going south; that he had no knowledge of the car going in the same direction that his car was traveling, coming up from the rear, until the crash came. I do not think this car was over 12 to 15 feet behind my car. Morrison just got past my left back fender, when they hit. Morrison was traveling in the center of the west side of the road; he heard no signals of any kind immediately before the crash; the speed of the motorcycle was 30 to 35 miles an hour; the damage to Gott's car was on the left front of the car.

Norma Morrison, wife of the deceased, testified she was on the motorcycle and sat on the back buddy seat. When asked if she recalled the occasion when there was a crash and wreck, she answered, Well, we just crashed,—and that was all. Immediately before the crash we were driving between the black line and the edge of the hardroad. When asked if she saw the automobile strike the motorcycle, she replied, I saw a

car coming,—but then I couldn't stop it. When I saw the car it was coming down the road.

Q. On which side of the road?

A. On the east side of the hardroad.

Q. Did you ever see it on the west side of the road any?

A. I do not remember about that.

Q. Did you see it just immediately before it struck the motorcycle, or the motorcycle struck it?

A. Well, I wouldn't say just how close it was,—the last I paid any attention to it.

Q. Which side of the road was it on?

A. It was on the right hand,—the left hand of us as we were going south.

Q. Did you see the automobile at any time when it was within 50 feet of your motorcycle?

A. Well, I would not say that; I wouldn't be no fair judge of that distance.

It was contended by appellant that the court erred in directing the jury to return a verdict finding the defendant not guilty, as the evidence and facts and circumstances show the defendant was guilty of negligence. It is argued by counsel for appellant that the circumstances show that Gott was within 15 feet of Schneider's car, going in the same direction, and that he was attempting to pass Schneider's car, and in doing so got into the south bound line of traffic, and before he could get back on his proper side of the road he collided with the motorcycle of deceased and caused his death.

The court's attention was then called to the opening statement of counsel for defendant. It is argued that this is the only reasonable construction that can be placed on the undisputed facts and circumstances in the case and that in arriving at this conclusion no inference would be necessary, but that the circumstances are so clear that no other conclusions could be fairly reached.

It is also contended that the court, in sustaining the motion of defendant for a directed verdict, entirely disregarded the opening statement of defendant's counsel to the jury, that defendant turned out to pass Schneider's car and then, for the first time, saw the motorcycle of the deceased, when it was too late for appellee to get back on his side of the road. That the court overlooked the fact that appellee should have remained on his side of the road until he knew that there were no vehicles approaching, and that appellee was derelict and negligent in that he was too late in looking for approaching vehicles. Counsel for

appellant are mistaken when they assume that the opening statement, made by counsel for defendant, was binding upon him and could be considered by the court in passing upon the motion of defendant for a directed verdict. *Pietsch* v. *Pietsch*, 245 Ill. 454, 92 N. E. 325; *Lask* v. *Throop*, 189 Ill. 127, 59 N. E. 586.

"When negligence is relied upon as a ground of recovery, the facts constituting it must be succinctly stated, and proved substantially as stated." *Miller* v. *C. & N. W. Ry. Co.*, 347 Ill. 487-493, 180 N. E. 455; *Buckley, et al, admrs.*, v. *Mandel Brothers*, 333 Ill. 368-373, 164 N. E. 657.

The rule is that in passing upon a motion for a directed verdict, if, when all of the evidence is considered, with all reasonable inferences drawn from it, in its aspect most favorable to the party against whom the motion is directed, there is a total failure to prove one or more necessary elements of the case, the motion should be allowed. *Williams* v. *Consumers Co.*, 352 Ill. 51, 185 N. E. 217; *Streeter* v. *Humrichouse*, 357 Ill. 234, 191 N. E. 684.

Counsel for appellant relies upon the opening statement as evidence that the defendant turned his car into the south bound lane of traffic and was unable to get back before the accident. Plaintiff was required under the law to prove by a preponderance of the evidence the negligent acts charged in some one or more of the counts of the complaint, or that defendant was guilty of the wilful and wanton conduct charged, before he could recover.

It is held in the case of *American National Bank* v. *Woolard*, 342 Ill. 148, 173 N. E. 787, that "In the absence of evidence on which a jury could in the eye of the law reasonably find in favor of the party holding the affirmative of an issue, a motion to direct a verdict against the party so holding the affirmative should be allowed. Evidence sufficient to defeat such a motion must be evidence upon which the jury will, without acting unreasonably in the eye of the law, decide in favor of the party so having the affirmative."

We find from the evidence that the plaintiff entirely fails to prove any of the allegations of negligence charged in the several counts of the complaint, and also fails to prove the charges of wilful and wanton misconduct on the part of the defendant. Judgment of the circuit court of Sangamon County is affirmed.

Judgment affirmed.

(Five pages in original opinion.)

PUBLISHED IN ABSTRACT

Austin Six, Appellee, v. Village of Bluffs, a municipal corporation, Appellant.

Appeal from Circuit Court, Scott County.

OCTOBER TERM, A. D. 1937. 293 I.A. 640

Gen. No. 9068 **Agenda No. 3**

MR. JUSTICE RIESS delivered the opinion of the Court.

Defendant appeals from a judgment in favor of the plaintiff in the sum of three hundred and twenty-five dollars and attorney fees in the sum of seventy-five dollars, which was entered by the Circuit Court of Scott County, Illinois, upon a verdict by a jury.

The case was tried under a second amended complaint containing one count which alleged that the plaintiff was employed by the defendant Village from August 1, 1934, until March 5, 1935, at the agreed sum of $1.50 a day. No recovery was sought on a quantum meruit.

It appears from the evidence that the plaintiff had acted as a special policeman, under an alleged appointment by the President of the Board of Trustees of the defendant Village, from May 17, 1934, to June 4, 1934. The appointment had been made by virtue of an Ordinance which provided in part that the President of the Board should from time to time appoint such special policemen as the Village might require. The Ordinance is in conflict with paragraph 11 of Chapter 24, entitled "Cities, Villages and Towns", State Bar Association Statutes, which provides in part "that *the President and Board of Trustees* may appoint a treasurer, one or more Street Commissioners, a Village Marshal and such officers as may be necessary to carry into effect the powers conferred on Villages, to prescribe their duties and fees, and require such officers to execute Bonds as may be prescribed by Ordinance." The Ordinance in question could not lawfully authorize the appointment of a special policeman by the President of the Board of Trustees alone contrary to the express provisions of the Statute, from which source its power to pass ordinances was derived.

The Village records offered in evidence showed that on June 4, 1934, the appointment was expressly disap-

proved by unanimous yea and nea vote of all six members of the Board of Trustees duly recorded in its Journal, and that on July 9, 1934, a further motion was duly passed by the Village Board by a unanimous recorded vote of all such Trustees that no claim for service would be paid the plaintiff until his appointment was approved by the Board of Trustees.

The plaintiff was paid all bills until August 1, 1934. He received no compensation after that time. From time to time he presented bills to the City Council, but none were allowed or paid.

From August 1, 1934, to March 5, 1935, the plaintiff made arrests, performed duties of the fire chief, acted as janitor, jailer, cleaned ditches, kept sewers open, looked after the fire engine and did everything that he was instructed to do by the President or members of the Board, and the plaintiff testified that no other person performed any such duties during that period of time, but the evidence also shows that the plaintiff was present at practically all meetings of the Board; that he presented a bill each month, and that his bills were disallowed, and although the plaintiff alleged that the Village had "agreed to pay him $1.50 per day," there is no evidence in the record as to any such agreement or as to the value of the services rendered.

The entire case of the plaintiff was predicated on the theory that he was to be paid at an agreed price of $1.50 per day. There was no other record of any meeting or action of the Village Board in regard to the appointment of Appellee except as above recited. The Statute provides that the yeas and nays shall be taken on all propositions to create any liability against the City, or for the expenditure or the appropriation of its money which shall be entered on the Journal of its proceedings. Illinois Rev. Statutes, Chapter 24, Par. 44.

It is quite evident that the President of the President of the Board of Trustees of the appellant Village had no authority to employ the appellee. Everyone is presumed to know the extent of the powers of a municipal corporation, and it cannot be estopped to aver its incapacity, which would amount to conferring power to do unauthorized acts simply because it has done them and received the consideration stipulated for. *DeKam* v. *City of Streator,* 316 Ill. 123, 146 N. E. 550.

The present case comes within the rule laid down in *Arnold* v. *Village of Ina*, 244 Ill. App., at page 239, which holds that no implied contract can be created against a Village by its acceptance of work done for it after oral consent of the Board, for the Statute has expressly declared the only method of binding a vil-large corporation. Nor could the plaintiff recover for his services as an officer de facto. An officer seeking to compel payment of compensation must show that he is an officer de jure and not merely an officer de facto. The fact that there was no de jure officer does not entitle a de facto officer to recover for his services. *Beams* v. *City of West Frankfort*, 233 Ill. App. 479; *Scott* v. *City of Chicago*, 205 Ill. 281, 68 N. E. 736; *McNeill* v. *City of Chicago*, 212 Ill. 481, 72 N. E. 450; *People* v. *City of Chicago*, 210 Ill. 479, 71 N. E. 400. The same rule prevails in other jurisdictions. 22 R. C. L. 599; 7 A. L. R. 1678; L. R. A. 1918F, 587; *Dolliver* v. *Parks*, 136 Mass. 499.

In *Beams* v. *City of West Frankfort*, supra, the Appellant was appointed Chief of Police by the Mayor and so confirmed by the Council. He so served and was paid therefor from May 21, 1921, until June, 1922. On June 5 of that year the Mayor reappointed him for one month, but the City Council refused to confirm his appointment and no other person was appointed. Subsequently, he was ousted from office by an order of the Circuit Court. He performed the duties of the office from June 1, 1922, until after judgment of the Court and received no pay for such services. He brought suit, a jury was waived and judgment entered in favor of the city and against plaintiff appellant for costs. Appellant contended that even though his appointment was not confirmed, he performed the duties of the office and, being an officer de facto, was entitled to recover. This Court, in its opinion by Justice Barry, did not agree with that contention and the judgment of the lower court was affirmed. It was there held that an officer seeking to compel the payment of compensation must show that he is an officer de jure and not merely an officer de facto; that a de facto officer who knew his right to the office is disputed is not entitled to compensation even though there is no officer de jure who could claim the same.

Complaint is made of Instruction Number three given for the plaintiff. The instruction is subject to criticism for the reason that it assumes that a con-

tract had been entered into between the Village and the plaintiff, which was the very question in issue between the parties.

In view of what we have said, however, it is unnecessary for us to further discuss any error with reference to the giving of this instruction.

The judgment of the Circuit Court of Scott County will therefore be reversed and the cause remanded.

Reversed and Remanded.

(Four pages in original opinion.)

(45938—1-38) 14

Fannie Fish, Administratrix of the estate of John Martin Fish, deceased; Fannie Fish, individually, and Central Life Assurance Society, a corporation of Des Moines, Iowa, Appellants, v. State Bank of Bement, a corporation of Bement, Illinois, Appellee.

Appeal from Circuit Court, Piatt County.

OCTOBER TERM, A. D. 1937. 293 I.A. 641

Gen. No. 9091 **Agenda No. 18**

MR. JUSTICE RIESS delivered the opinion of the Court.

Plaintiff Appellants, Fannie Fish, Administratrix of the estate of John Martin Fish, deceased, and Fannie Fish, individually, filed an amended complaint in chancery in the Circuit Court of Piatt County, in which their co-plaintiff did not join, praying that a certain assignment alleged to have been executed and delivered by the Appellants to the Defendant Appellee, State Bank of Bement, Illinois, be construed by the Court in accordance with the Plaintiffs' contention therein. The Court sustained a motion by the defendant to dismiss the complaint for want of equity and entered its decree accordingly, whereupon this appeal followed.

The complaint alleged that John Martin Fish and Fannie Fish, his wife, on or about January 1, 1934, while indebted to the State Bank of Bement, Defendant herein, in the sum of $3400, executed and delivered to said Defendant a written assignment of an insurance policy which had been issued by the Central Life Assurance Society, a Corporation, of DesMoines, Iowa, on the life of John Martin Fish, and in which policy of insurance Fannie Fish was named as beneficiary: that the assignment was made to secure a promissory note in the sum of $3400, which the Plaintiffs owed to the Defendant; that the plaintiffs, as further collateral security for their said note, executed and delivered to the Defendant their mortgage on approximately twenty acres of land in Clark County, Illinois, the title to which was in the name of John Martin Fish, and also a mortgage on one acre of land in Westfield, Illinois, the title thereto being in Fannie

Fish, together with two shares of stock in the Vorhies Cooperative Grain Company of Vorhies, Illinois, the title of which was in John Martin Fish.

It further appears from the allegations of the complaint that all of the principal and interest on the note for $3400 except a balance of $98.34 has been paid; that one Willie Fish, a son of John Martin Fish, had given his note to the Defendant in the sum of $764, which latter note had also been signed by John Martin Fish and on which there was due and unpaid the sum of $764 as principal and $271 interest, and that the Defendant claims that the written assignment in question conveys to it all interest which either Fannie Fish, as administratrix of the estate of John Martin Fish, deceased, or Fannie Fish, individually, may have had in the insurance policy in question, to secure the payment of the note of Willie Fish so signed by John Martin Fish; alleges that Willie Fish denies this debt in toto, but there appears no allegation as to how or in what manner it has been paid, nor does the complaint allege that John Martin Fish is not liable on the note which is set forth therein.

The complaint further alleges that the Plaintiffs have made a tender to Defendant of the balance due on the $3400 note of $98.34, as principal, and $8.99 as interest, and that they requested the Defendant to release the mortgage on the real estate in Clark County, Illinois, and in Westfield, Illinois, and to surrender to Fannie Fish, as administratrix, the two shares in the Vorhies Cooperative Grain Company, and then prays that the assignment on the insurance policy be construed and adjudicated to mean that the same was security and collateral only for the principal note in the sum of $3400, and that the Court, upon payment to the Clerk thereof of the sum of $107.33, enter an Order directing the Defendant Appellee to release its mortgage and surrender its collateral.

The sole question to be determined is whether or not, under the terms of the assignment, the Appellee had a valid claim to the proceeds of the insurance policy for the purpose of paying the same on the note signed by Willie Fish and John Martin Fish. The assignment reads as follows:

> "Assignment of Policy as Collateral Security.
>
> In consideration of *$1.00 & other good and valuable consideration,* the receipt of which is hereby acknowledged, we hereby sell, transfer, and assign

and set over to the State Bank of Bement, Ill., and its executors, administrators, or assigns, as their interests may appear, all our right, title and interest in and to Policy No. 53297, dated Sept. 1, 1908, issued on the life of John Martin Fish, by the Ill. Life Ins. Co., except as hereinafter provided, subject to .....and to all the terms and conditions, in said policy contained. The interest of the assignee in the policy hereby assigned is limited to said assignees valid pecuniary claim against the assignors existing at the time of the settlement of the policy, the remainder of said policy, if any, being unaffected by this assignment, the said assignee hereby agreeing that in any settlement of said policy there shall first be deducted all liens against said policy, and all then existing indebtedness to the company or its successors in interest on said property.

Dividends not to pass to assignee."

Witness our hands 1/4/34

LEW WILKINSON J. M. FISH

REUBEN ADKINS

Signatures of Assignee.

In the construction of an assignment, the main object is to ascertain the intention of the parties, and this intention is derived not only from the instrument, but from the circumstances surrounding the transaction. *Angelina County Lumber Co.* v. *Michigan Central Railroad Co.*, 252 Ill. App. 82; 6 C. J. S., 1138, par. 83.

It is true that the assignment in question provides that the interest of the assignee in the policy assigned is limited to the assignee's valid pecuniary claim against the assignors, existing at the time of the settlement of the policy. However, Section 3 of Chapter 76 entitled "Joint rights and obligations," Smith-Hurd Illinois Annotated Statutes, provides: "Except as otherwise provided in this act, all joint obligations and covenants shall be taken to be joint and several obligations and covenants."

The assignment does not specifically describe the debt for which it was given, but provides generally that the interest of the assignors in the policy was assigned for the purpose of paying the valid pecuniary claims that the assignee might have against the assignors and which might exist at the time of the settlement of the policy. From the face of the complaint, it appears that the valid pecuniary claims of the assignee against the assignor consisted of his liability for the

payment of any balance due on both notes so signed by him, and we hold that the policy assignment was given to secure the payment thereof.

Defendant's motion to dismiss the complaint admitted, for the purposes of such motion, all material facts well pleaded, but did not admit the conclusions of the plaintiffs therefrom. The Trial Court did not err in sustaining the motion to dismiss the complaint for want of equity, as it did not state a good cause of action.

The judgment of the Circuit Court of Piatt County will therefore be affirmed.

Judgment Affirmed.

(Four pages in original opinion)

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